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n114 See Virginia Citizens Consumer Council, 425 U.S. at 762 (holding that commercial speech is not so removed from the exposition of ideas as to completely lack First Amendment protection).

n115 The Virginia Citizens Consumer Council Court soundly rejected the State's argument that consumers might act against their interests if given drug price information, noting that "it is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." Virginia Citizens Consumer Council, 425 U.S. at 770. Just this year, the Court reaffirmed its antipaternalism sentiment in the commercial speech context. See Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1508 (1996) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."); see also Strauss, supra note 1, at 343-45 (implicating an anitpaternalistic rationale by describing the Court's refusal to regulate commercial speech that may "persuade people to do things that are harmful to [them].").

n116 Virginia Citizens Consumer Council, 425 U.S. at 771-72.

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C. Kantian Autonomy and the Court's Free Speech Jurisprudence

Thus far, I have argued that the structure of the Court's First Amendment jurisprudence is consistent with a Kantian autonomy rationale, although not in the narrow sense espoused by many scholars. Although the Court's doctrine clearly presumes a sphere of liberty from state regulation, the focus of most scholars' autonomy arguments, its doctrine regarding low-value speech shows that the right to say what we wish is not the only aspect of autonomy encompassed IN the First Amendment. Instead, notions of autonomy impose upon all of us an enforceable responsibility not to invade the thought processes of others by using speech in a coercive manner.

What conclusions can we draw regarding the fact that the Court's decisions are consistent with Kant's theory of autonomy? First, thinking of autonomy as encompassing liberty and responsibility reveals that the Court's First Amendment jurisprudence is about dialogue. Autonomy is not about atomistic, selfish individuals but about people with different ideas and strong disagreements coming together as members of a community to discuss issues. n117 That discussion need not be passionless, n118 but it must not be coercive if we are to maintain our status as autonomous individuals in a civilized society.

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n117 Like Kant, at least one modern commentator has noted that "speech . . . is the process by which we think together." Kathleen M. Sullivan, Resurrecting Free Speech, 63 FORDHAM L. REV. 971, 984 (1995). Professor Post makes a similar argument, noting that "traditional First Amendment doctrine guarantees that democratic dialogue will remain continuously available to the potential contributions of its individual participants. Autonomy, properly understood, signifies that within the sphere of public discourse and with regard to the suppression of speech the state must always regard collective identity as necessarily open-ended." Post, supra note 12, at 1122. His reasoning appears to apply to citizens' attempts to cut off dialogue as well. The Court's First

Amendment doctrine ensures that our continuing discussion as a community is safe from both government and private coercion.

n118 As Professor Sherry has pointed out, "pure ratiocination is not the only form that reasoning can take." Suzanna Sherry, The Sleep of Reason, 84 GEO. L.J. 453, 455 (1996). Rather, reason has many components, including, even during the Enlightenment period in which Kant wrote, a practical one. See id. at 455-57 & n.7.

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[*187] Second, the Court's jurisprudence acknowledges that some issues are better left to a sphere of moral obligations. The idea that the First Amendment has something to do with moral obligations might seem odd given that, textually, its concerns are clearly legal -- i.e., it is specifically directed toward determining the acceptability of laws regulating speech. However, the Court's attempt to walk the fine line of protecting society from coercive private speech without allowing government censorship involves an element of moral rather than legal obligation. For example, while the Court is willing to allow criminal punishment of fighting words, it will not punish speech merely because we are offended by it. Fighting words may be offensive but that is not why the State may regulate them. Instead, it may regulate fighting words because they go beyond being offensive ideas and invade our thought processes by instigating an unthinking, physical response. Such words are appropriate for legal regulation. But offensive speech, although we may disagree with it, conveys an idea. To allow the State to suppress it is to abdicate our moral responsibility to discuss our disagreements and try to resolve them. Only individuals living in a community can come to a determination of what is right and wrong. In this sense, although the First Amendment (and the rhetoric of the Court's opinions) is couched in terms of law, it does recognize an element of moral obligation with respect to speech.

IV. Viewing Hate Speech Through the Lens of Kantian Autonomy

This new understanding of autonomy may be able to resolve the apparent conflict between autonomy and other values that lies at the core of the scholarly debate. Although the autonomy debate has taken place in several contexts, n119 I focus only on hate speech, defined as "expression that abuses or degrades others on account of their racial, ethnic or religious identity." n120 I do so because the controversy over hate speech regulation has been a dominant presence in both scholarly n121 and [*188] public n122 debate and because the Court's most recent encounter with the issue in R.A.V. v. City of St. Paul n123 is still the subject of widespread discussion and criticism. n124

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n119 See supra notes 5-7 and accompanying text.

n120 Steven J. Heyman, Introduction: Hate Speech Regulation and the Theory of Free Expression, in 1 HATE SPEECH AND THE CONSTITUTION, ix (Steven J. Heyman ed., 1996). I have used Professor Heyman's definition mainly for simplicity's sake. Although hate speech encompasses far more than ethnic and religious hatred, much of the debate has taken place in that context.

n121 For a review of articles published prior to 1991, see Post, supra note 1, at 267 n.5. For a sampling of more recent articles on hate speech, see Akil Reed Amar, The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992); John M. Blim, Undoing Our Selves: The Error of Sacrificing Speech in the Quest for Equality, 56 OHIO ST. L.J. 427 (1995); Richard Delgado & David H. Yun, Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation, 82 CAL. L. REV. 871 (1994); Edward J. Eberle, Hate Speech, Offensive Speech, and Public Discourse in America, 29 WAKE FOREST L. REV. 1135 (1994); Alon Harel, Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech, 65 S. CAL. L. REV. 1887 (1992); Elena Kagan, Regulation of Hate Speech and Pornography after R.A.V., 60 U. CHI. L. REV. 873 (1993); Charles R. Lawrence, III, Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment, 37 VILL. L. REV. 787 (1992); Massey, supra note 20; and Cass R. Sunstein, Words, Conduct, Caste, 60 U. CHI. L. REV. 795 (1993).

n122 See, e.g., John Wiener, Words That Wound: Free Speech For Campus Bigots?, 250 NATION 272 (1990); Lee Dembart, At Stanford, Leftists Become Censors, N.Y. TIMES, May 5, 1989, at A35; Henry Gates, Jr., Let Them Talk, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37; Anthony Lewis, Words Matter, N.Y. TIMES, May 5, 1995, at A31; Mari Matsuda, On the Internet, Silence Some to Save Others, NEWSDAY, June 1, 1995, at A34; Jonathan Rauch, In Defense of Prejudice, HARPER'S, May 1995, at 37; George Will, Liberal Censorship, WASH. POST, Nov. 5, 1989, at C7.

n123 505 U.S. 377 (1992).

n124 See, e.g., Owen M. Fiss, The Supreme Court and the Problem of Hate Speech, 24 CAP. U. L. REV. 281 (1995) (criticizing generally R.A.V. majority's reasoning); Susan M. Gilles, Images of the First Amendment and the Reality of Powerful Speakers, 24 CAP. U. L. REV. 293, 295-96 (1995) (criticizing R.A.V. majority for "ignoring the relative power of speakers"); Thomas C. Grey, How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience, 29 U.C. DAVIS L. REV. 891, 931-40 (1996) (criticizing generally R.A.V. decision); Juan F. Perea, Strange Fruit: Harassment and the First Amendment, 29 U.C. DAVIS L. REV. 875, 876 (1996) ("The abstruse majority opinion in R.A.V. . . . ignores the real victims of the episode."); N. Douglas Wells, Whose Community? Whose Rights? -- Response to Professor Fiss, 24 CAP. U. L. REV. 319 (1995) (criticizing R.A.V. Court's failure to allow regulation of hate speech and proposing a solution based on an international approach); see also articles supra note 121.

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A. The Hate Speech Debate

The format of the hate speech debate parallels the scholarly debate discussed in Part I. Critics of hate speech regulation point out that proposed restrictions amount to government censorship of an abhorrent viewpoint, and thus invade our thought processes. n125 In contrast, those who favor regulation of hate speech argue that such speech is irrational and coercive, causing severe emotional and psychological damage. n126 Thus, [*189] they argue that regulation of such speech is legitimate for the same reasons that regulation of fighting words is legitimate. n127 Scholars favoring regulation further maintain that hate speech silences its victims, thereby detracting from, rather than

contributing to, public deliberation. n128 Suppression of speech in this instance is necessary to preserve the integrity of public discourse and to ensure that "the victims of racist speech are heard." n129 At the bottom of both arguments in favor of regulation is the understanding that hate speech is a substantial barrier to racial equality. n130 Given the nature and history of racism in this country, scholars argue that progress in social equality may have to "come at the expense of the right of free speech, at least as it has been conceptualized in the modern tradition." n131 Thus, the hate speech debate pits autonomy against another of our foundational rights -- equality. As one scholar has noted, "we seem to face a 'tragic choice' in which we cannot defend free speech without sacrificing [civility and equality], and cannot protect [civility and equality] without doing violence to the ideal of free speech." n132

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n125 See, e.g., Fried, supra note 1, at 245-46 (noting that those who promulgate campus speech codes "assign to themselves the authority to determine which ideas are false and which false ideas people may not express as they choose"); Massey, supra note 20, at 195 ("By identifying particular ideas as incompatible with public discourse, [those who favor regulation of hate speech] impose a censorship on public discourse that is fundamentally incompatible with autonomous self-governance.").

n126 See, e.g., Kenneth Lasson, Group Libel Versus Free Speech: When Big Brother Should Butt In, 23 DUQ. L. REV. 77, 122 (1984) (characterizing hate speech as "linguistic abuse" and "the kind of fascism which aims at political and economic annihilation of groups"); Lawrence, supra note 5, at 452-53 (arguing that hate speech is coercive in much the same manner as fighting words). For general descriptions of the harms caused by hate speech, see Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 HARV. C.R.-C.L. L. REV. 133, 135-49 (1982), and Mari J. Matsuda, Public Response To Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320, 2336-41 (1989).

n127 See Lawrence, supra note 5, at 451-53.

n128 See Lawrence, supra note 5, at 452-54; Delgado & Yun, supra note 121, at 877, 883-85. For an excellent review of the arguments regarding silencing, see Post, supra note 1, at 306-08. To some extent the coercion and silencing arguments are linked, at least insofar as the coercive effect of the speech results in the silencing of the victim. Professor Post has reviewed the relationship between the silencing and coercion arguments in detail. See id. at 302-09.

n129 Lawrence, supra note 5, at 481.

n130 See, e.g., Lawrence, supra note 5, at 458 (noting the link between racist epithets, vilification, and inequality).

n131 Blim, supra note 121, at 429 (footnote omitted).

n132 Heyman, supra note 120, at xiv (footnote omitted); see also Blim, supra note 121, at 429 (noting that supporters and detractors of hate speech regulation appear to view free speech and equality "as potentially competing interests").

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Perhaps recognizing that the Court would not allow a complete excision of hate speech from public discourse n133 and attempting to alleviate the tragic choice between liberty and equality, a number of people advocate narrower regulations of hate speech. Most commonly, drafters of such regulations track the language of the Court's fighting words doctrine by [*190] creating a regulation that explicitly bans racially hateful fighting words. n134 By grounding the ban on hate speech in a category of otherwise unprotected speech, proponents of such regulation hope to avoid allegations of broad censorship of ideas while still punishing the most assaultive and harmful forms of hate speech. Such proponents believed that the regulation promoted an agenda of social equality without infringing upon our First Amendment freedoms. n135 It was just such a law that came before the Court in R.A.V. and which, on first glance, appears to have split the Justices down much the same lines as the scholarly debate.

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n133 The modern Court would surely strike down broad bans on speech that degrades on the basis of race as being overly broad or as violating its principle against content discrimination of speech. Indeed, even the four concurring justices in R.A.V., while criticizing the majority's reasoning in striking down a hate speech ordinance, would have ruled it unconstitutional as overly broad. See infra note 138.

In fact, many scholars arguing for regulation of hate speech appear to acknowledge that complete censorship of all racially hateful speech is neither possible nor desirable. See, e.g., Matsuda, supra note 126, at 2357 ("[We should] argue long and hard before selecting a class of speech to exclude from the public domain . . . . In order to respect first amendment values, a narrow definition of actionable racist speech is required."); Sunstein, Words, Conduct, Caste, supra note 121, at 825 ("I do not argue for broad bans on hate speech. Most such bans would indeed violate the First Amendment because they would forbid a good deal of speech that is intended and received as a contribution to public deliberation.").

n134 Many such attempts at narrow hate speech regulations have appeared on college campuses. For example, the Stanford University code provides:

Speech or other expression constitutes [prohibited] harassment by personal vilification if it:

(a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and

(b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and

(c) makes use of insulting or "fighting" words or nonverbal symbols . . . "which by their very utterance inflict injury . . ." [and] are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation,

or national and ethnic origin.

See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1304-05 (3d ed. 1996) (setting forth Stanford regulation); see also Lawrence, supra note 5, at 450-57 (describing how Stanford regulation is consistent with the fighting words doctrine).

Proponents of hate speech legislation have also based their arguments for regulation on other forms of low-value speech. See, e.g., Delgado, supra note 126 (arguing for creation of a tort for racial insults much like the tort of intentional infliction of emotional distress); Lasson, supra note 126 (arguing in favor of laws that prohibit racial defamation).

n135 See Grey, supra note 124, at 902-06 (discussing purpose of Stanford speech code); Lawrence, supra note 5, at 449-57 (discussing need for and constitutionality of regulating discriminatory fighting words).

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B. Reviewing R.A.V.

The city ordinance in R.A.V. prohibited the display of any "symbol . . . including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender." n136 However, in order to avoid the problem of overbreadth in the regulation of offensive speech, n137 the majority accepted the Minnesota [*191] court's construction of the statute to reach "only those expressions that constitute 'fighting words' within the meaning of Chaplinsky." n138 Thus, the issue that ultimately divided the Court is whether St. Paul could regulate only racially hateful n139 fighting words while leaving other kinds of fighting words unpunished.

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n136 ST. PAUL, MINN., LEGIS. CODE @ 292.02 (1990). R.A.V., the minor defendant, was charged under the ordinance after burning a wooden cross in the yard of a black family living on the block where he was staying. R.A.V. v. City of St. Paul, 505 U.S. 377, 379 (1992).

n137 For a discussion of the Court's refusal to allow punishment of speech merely because it is offensive, see supra notes 85-88 and accompanying text.

n138 R.A.V., 505 U.S. at 381 (citing In re Welfare of R.A.V., 464 N.W.2d 507, 510-11 (Minn. 1991)). Justices White, Blackmun, O'Connor, and Stevens would have eschewed the narrow construction and ruled the ordinance unconstitutional on overbreadth grounds. See R.A.V., 505 U.S. at 411 (White, J., concurring).

n139 In addition to racially hateful fighting words, the St. Paul ordinance encompassed fighting words based upon gender, religion, creed, and color. See ST. PAUL, MINN., LEGIS. CODE @ 292.02 (1990). I use "racially hateful" mainly for ease of reference and because racial hatred was the context in which the case arose.

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The majority holds the statute to be unconstitutional, primarily because it regulates fighting words based upon the racially hateful viewpoint they express. n140 Although reaffirming that fighting words are low-value speech, n141 the Court rejects the notion that St. Paul could selectively regulate them. n142 Instead, the Court notes that while "areas of [low-value] speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) -- . . . they are [not] categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." n143 In the majority's view, St. Paul had attempted to regulate fighting words not because of their "'nonspeech' element of communication" n144 but because they conveyed the idea of racial hatred to particular audiences. Thus, the majority concludes that the ordinance is impermissibly content- and viewpoint-based. n145

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n140 The majority's actual words are that the ordinance is unconstitutional "in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." R.A.V., 505 U.S. at 381 (emphasis added). Like Professor Kagan, however, I believe that the majority's concern lies mainly with viewpoint discrimination, in other words, that the ordinance is an attempt to punish only certain, abhorrent views regarding race. See Kagan, supra note 121, at 889 n.47; see also R.A.V., 505 U.S. at 390-94 (discussing ordinance's viewpoint bias).

n141 Until R.A.V., some commentators doubted whether the Court's fighting words doctrine remained good law, especially because the Court had not upheld a fighting words conviction since Chaplinsky, 315 U.S. 568 (1942). See Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal?, 1990 DUKE L.J. 484, 510. After R.A.V., however, the Court's fighting words doctrine appears to be alive and well, at least in the narrowed form discussed in its post-Chaplinsky cases. See supra notes 82-88 and accompanying text.

n142 See R.A.V., 505 U.S. at 384.

n143 Id. at 383-84.

n144 Id. at 386. The Court likens fighting words to a noisy sound truck, noting that "each is . . . a 'mode of speech'; both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment." Id. (citations omitted).

n145 See id. at 392. The Court was especially moved by the city's stated desire to send a message that "group hatred . . . is not condoned by the majority." Brief for Respondent at 25, R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) (No. 90-7675). "The point of the First Amendment," the majority notes, "is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." R.A.V., 505 U.S. at 392.

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[*192] This reasoning causes great dismay among the four concurring justices who accuse the majority of "casting aside long-established First Amendment doctrine . . . and adopting an untried theory." n146 Arguing that

the Court's jurisprudence had long allowed for regulation of lowvalue speech based upon its content, they find it "inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil . . . but that the government may not treat a subset of that category differently without violating the First Amendment." n147 The majority's approach, they claim, elevates the Court's prohibition on content regulation to unreasonable heights n148 and ignores "the City's judgment that harms based on race, color, creed, religion, and gender are more pressing public concerns than the harms caused by other fighting words." n149 Indeed, the concurring Justices are so dissatisfied with the majority's approach that they condemn it as "legitimating hate speech as a form of public discussion." n150

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n146 R.A.V., 505 U.S. at 398 (White, J., concurring). Justices Blackmun and O'Connor joined Justice White's opinion. Justice Stevens joined all but Part I.A. thereof. See id. at 397; see also id. at 417 (Stevens, J., concurring) (eschewing the "absolutism" of Justice White's assertion that the majority ignores longstanding jurisprudence regarding low-value speech).

n147 Id. at 401 (citations omitted).

n148 See id. at 400 (White, J., concurring) ("Today . . . the Court announces that earlier Courts did not mean their repeated statements that certain categories of expression are 'not within the area of constitutionally protected speech.'") (quoting Roth v. United States, 354 U.S. 476, 483 (1957)); id. at 415 (Blackmun, J., concurring) ("By deciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads), the Court seems to abandon the categorical approach . . . ."); id. at 422 (Stevens, J., concurring) ("Disregarding the vast body of case law, the Court today . . . applies the prohibition on content-based regulation to speech that the Court had until today considered wholly 'unprotected' by the First Amendment -- namely, fighting words.").

n149 Id. at 407 (White, J., concurring). Justice White elaborates, noting that "[a] prohibition on fighting words . . . is a ban on a class of speech that conveys an overriding message of personal injury and imminent violence, a message that is at its ugliest when directed against groups that have long been targets of discrimination." Id. at 408-09 (White, J., concurring) (citation omitted).

n150 R.A.V., 505 U.S. at 402.

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C. A Kantian Perspective

After R.A.V., one might conclude that the scholars engaging in the autonomy debate have been right all along. Specifically, the Court really does conceive of autonomy as the right of atomistic individuals to say whatever they wish even if it harms others. The concurring Justices apparently see that concept in what they label the "new absolutism in the [*193] prohibition of content-based regulations." n151 But such an argument does a disservice to the majority opinion, for upon closer examination one can see that the majority's reasoning is consistent with a richer, Kantian notion of autonomy. Some of the R.A.V.

Court's rhetoric clearly provides fuel for the concurring Justices' claim. Indeed, the majority's legal analysis opens with an almost strident statement regarding the evils of content discrimination, n152 thus seemingly enshrining that concept (and underlying notions of individualism) as the only significant aspect of the Court's jurisprudence. But the majority never holds that its principle against content discrimination prohibits all regulation of racially hateful fighting words. Indeed, the Court makes quite clear that such speech could be punished under a neutral fighting words statute. n153 In that sense, its reasoning is consistent with a Kantian notion of autonomy, which calls for regulation of speech that attempts to override our thought processes.

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n151 Id. at 422 (Stevens, J., concurring).

n152 See id. at 382 ("The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed. Content-based regulations of speech are presumptively invalid.") (citation omitted). The Court's offhand statement that fighting words "sometimes . . . are quite expressive indeed," id. at 385, is similarly misleading. Under a Kantian theory, fighting words can be regulated because of their invasive effect on our thought processes. By referring to their potentially expressive nature, however, the Court lends credence to the argument that our First Amendment freedom is mainly a speaker's right.

n153 See id. at 394-96.

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The Court's concern regarding viewpoint discrimination within the category of fighting words, far from being about atomistic speakers, is similarly consistent with Kantian autonomy. That notion of autonomy requires the government to maintain a fine line between regulating speech that invades our thought processes and regulating speech that appeals to those thought processes. By regulating only racially hateful fighting words, the St. Paul ordinance fell on the wrong side of that line. The ordinance's selective focus made it appear to regulate speech because of the idea of racial hatred expressed rather than because of the coercive effect associated with fighting words. n154 Such an attempt to excise an abhorrent viewpoint from public discourse violates the public exercise of reason that is at the core of Kantian autonomy. n155 Thus, the majority's focus on view-point [*194] discrimination does not elevate that principle above all others but merely attempts to walk a tightrope of preventing private coercive speech while nevertheless avoiding government censorship, just as the Court has done throughout its low-value speech analysis. n156

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n154 See id. at 396 ("The only interest distinctively served by the content limitation is that of displaying the city council's hostility towards the particular biases thus singled out."); see also Kagan, supra note 121, at 899-900 ("When the government regulates within [a] category [of speech] on the basis of a viewpoint extraneous to the category . . . there is reason to suspect that the government is acting not for the reasons already found by the Court to be legitimate, but rather out of hostility to a message.").

n155 One could argue, of course, that the idea of racial hatred is itself coercive and thus can be excised from public discourse in a manner consistent with Kantian autonomy. Such an argument, however, conflicts with Kantian autonomy in that it presupposes the rightness or wrongness of an idea prior to the exercise of our reason. See Heyman, supra note 117, at 888-92; see also Post, supra note 1, at 310 ("It is fundamentally incompatible with public discourse to excise specific ideas because they are . . . deemed to be coercive.").

n156 In this sense, the Court's concern over the St. Paul ordinance is similar to its concern regarding regulation of offensive speech. Although the latter involves overly broad regulations and the former an underinclusive law, both appear to step over the boundary of regulating coercive speech and into the realm of regulating ideas.

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Perhaps the most significant fact to recognize about R.A.V. is its consistency with the Kantian notion of people as social creatures whose capacity for autonomy includes responsibility to others. As a legal matter, we can and should regulate vicious and hateful speech when it amounts to an invasion of our thought processes. Such circumstances might include imposing punishment on hate speech when it falls within the rubric of fighting words, incitement to riot, intentional infliction of emotional distress, n157 and intimidation. n158 Far from being an illegitimate censorship of speech as some scholars claim, n159 punishment of hate speech under such neutral laws is necessary to preserve the equal dignity of all individuals and to promote public discourse. n160

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n157 The status of intentional infliction of emotional distress as a category of low-value speech is somewhat unclear. After Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988), "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'" However, commentators seem to agree that the tort is available to private citizens when speech intentionally causes emotional distress. See Fallon, Harassment, supra note 60, at 10-11 & n.54; Post, supra note 90, at 662.

n158 The Court has never explicitly recognized intimidation as a category of low-value speech. Its doctrine has, however, repeatedly assumed that some forms of intimidation, such as threats, are completely beyond the reach of the First Amendment. See Watts v. United States, 394 U.S. 705 (1969); see also Fallon, Harassment, supra note 60, at 13 ("The Supreme Court -- along with nearly everyone else -- has generally treated it as self-evident that some verbal acts [including threats] get no protection."). Threats, like the categories of low-value speech, attempt to coerce or circumvent our rational nature. As such their regulation is consistent with Kantian autonomy. For a different view regarding when threats should be considered beyond the rubric of the First Amendment, see KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 249-59 (1989).

n159 See, e.g., Strossen, supra note 141, at 508-17 (arguing that the Court's fighting words category and the tort of intentional infliction of emotional

distress generally allow for government censorship of speech).

n160 It is possible that some speech which does not fall within these categories will nevertheless be punished. While that is a problem of enforcement over which we must be watchful, it is not a reason to refuse to regulate hate speech that does fall within regulable boundaries.

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Laws that specifically target only racially hateful speech, however, are a different matter. As a normative issue, we must continue to discuss the morality of racism. To allow the State to ban communication of the idea of racial hatred admits that we are incapable of making rational decisions about that issue, an admission antithetical to Kantian autonomy. ñ161 [*195] In so doing, we absolve ourselves of the responsibility to discuss and try to resolve the very significant problem of racial hatred. After all, if we are incapable of making rational decisions, we cannot possibly be held accountable for failing to rid ourselves of racism. But responsibility for racial hatred does not lie with the State; it lies with us. And while the State can regulate invasive manifestations of that hatred (even those manifested through speech), only we can eradicate the idea of racial hatred by the Kantian exercise of our public reason through communication.

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n161 This is not to say that all viewpoint discrimination is necessarily inconsistent with Kantian autonomy. While a thorough discussion is beyond the scope of this Article, one could fashion an argument that, in certain contexts, regulation of particular viewpoints does not amount to the excision of a particular idea but rather amounts to regulation of invasive conduct. Thus, one might be able to argue that workplace harassment laws are not concerned about ideas but with the particularly coercive effect of such speech in the workplace environment. Such an argument is similar to the Court's previously announced doctrine that protects a "captive audience" from offensive speech because of the context in which the speech occurs. See, e.g., Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (plurality opinion) (ruling that a city's decision not to subject users of the local rapid transit system to the "blare of political propaganda" is constitutional). In contrast, the ordinance at issue in R.A.V. criminalized racially hateful fighting words that were part of public discourse, a situation where captive audience concerns do not come into play. Thus, the regulation aimed at suppressing particularly abhorrent ideas in a manner inconsistent with Kantian autonomy. For other arguments regarding the importance of context in free speech jurisprudence, see KENT GREENAWALT, FIGHTING WORDS 81, 86-87 (1995) (discussing the importance of context in free speech analysis of workplace harassment); Mary Becker, How Free is Speech at Work?, 29 U.C. DAVIS L. REV. 815, 872-73 (1996) (noting the distinction between regulation of public discourse and work-place harassment); and Fallon, Harassment, supra note 60, at 38-41 (discussing generally the importance of context in free speech jurisprudence).

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Conclusion

The Court's use of an autonomy rationale has taken something of a beating lately. Given the impoverished concept of autonomy that most scholars attribute to the Court's jurisprudence, such an occurrence is not surprising. The image of isolated individuals pursuing selfish goals with little or no thought for personal responsibility is disturbing considering that we live in a society rather than a state of nature. Unfortunately, that image tends to be the one most often associated with autonomy, not just among free speech scholars but among the general public as well. n162 And because "autonomy is an ideal with distinctive importance in modern life," n163 many have come to defend even this meager conception vehemently.

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n162 As an extreme example, the Montana Freemen's recent self-proclaimed secession from organized society was mainly orchestrated in the name of "freedom." See John Balzar, A Little Too Much Freedom?, L.A. TIMES, Apr. 8, 1996, at A1 (discussing the "growing hunger for absolute freedom, which could also be called grand self-indulgence, [that] produced the . . . 'freemen'").

n163 Fallon, Autonomy, supra note 29, at 902-03. Professor Fallon explains that "in the cacophony of pluralist culture, the 'idea has entered very deep' that every person possesses her own originality, and that it is of 'crucial moral importance' for each to lead a life that is distinctively self-made." Id. (quoting CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY 28-29 (1992)).

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[*196] But notions of autonomy need not be so empty. Rather, a complete measure of autonomy recognizes that it is not merely a right but a moral entitlement to freedom. In turn, this implies a responsibility to respect the autonomy of others. Despite scholars' claims, the Court's free speech jurisprudence has implicitly incorporated such a notion of autonomy. Understanding this fact may allow us to reassess our understanding of the meaning of the term "freedom of speech." A refurbished notion of autonomy reveals that "freedom of speech" does not mean using speech in any manner we see fit. Rather, we are morally and legally obligated to use speech in a manner that respects the thought processes of others. It also means, however, that we cannot cede to the State our ability and obligation to discuss and attempt to resolve the pressing issues of our time.

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THE SUPREME COURT, 1996 TERM: FOREWORD: IMPLEMENTING THE CONSTITUTION

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SUMMARY:
... As the Court attempts to implement the Constitution, its task is much complicated by the phenomenon of reasonable disagreement in constitutional law. ... The other, less noted issue raised by reasonable disagreement involves the means by which Justices of the Supreme Court, who might themselves disagree about the best reading of the Constitution, might nonetheless come to reasonably stable agreement about doctrinal formulations. ... In his concurring opinion in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, for example, Justice Scalia joined a majority of the Court in invalidating a municipal ordinance that forbade a number of specific practices, involving the ritual slaughter of animals, that were predominantly engaged in by a minority religion. ... I would, however, make one discrete point: anyone's view about this issue is likely to depend at least partly on her assessment of the range of reasonable disagreement about how a standard or balancing test is appropriately applied. ... Yet this past Term he not only joined decisions, but actually authored one, in which the Court followed precedent and applied a balancing test. ...

TEXT:
[*54] [*55] [*56]

Introduction

Among the most important functions of the Supreme Court are to craft and apply constitutional doctrine n1 - a term that I use to embrace not only the holdings of cases, but also the analytical frameworks and tests that the Court's cases establish. n2 The need for doctrine arises partly from uncertainty about which values the Constitution encompasses and how protected values should be specified. For example, there are well-known disputes about whether the equality norm expressed in the Equal Protection Clause bars affirmative action preferences n3 and about whether the First Amendment encompasses a right to burn the flag n4 or to disseminate obscenity. n5 For the Constitution to function effectively as law, the Court must provide an authoritative resolution of disputes such as these. But the need for doctrine rests at least partly on

another factor.

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n1. See Charles Fried, Constitutional Doctrine, 107 Harv. L. Rev. 1140, 1140 (1994) [hereinafter Fried, Constitutional Doctrine]; Charles Fried, Types, 14 Const. Commentary 55, 75 (1997) [hereinafter Fried, Types]; Edward Rubin & Malcolm Feeley, Creating Legal Doctrine, 69 S. Cal. L. Rev. 1989, 1990 (1996); Frederick Schauer, Opinions as Rules, 62 U. Chi. L. Rev. 1455, 1470-71 (1995).

n2. Cf. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1128-29 (1996) (asserting adherence to the "rationale upon which the Court based the results of its earlier decisions"); McNollgast, Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law, 68 S. Cal. L. Rev. 1631, 1639 (1995) ("We interpret doctrine as being the set of rules and methods to be used to decide a particular class of cases.").

n3. See City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

n4. See United States v. Eichman, 496 U.S. 310, 315 (1990); Texas v. Johnson, 491 U.S. 397, 406 (1989).

n5. See Eric M. Freedman, A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make It Particularly Urgent for the Supreme Court to Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment, 81 Iowa L. Rev. 883, 890-91 (1996); Frederick Schauer, Speech and "Speech" -- Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 Geo. L.J. 899, 926 (1979).

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Even when general agreement exists that the Constitution reflects a particular value or protective purpose, questions of implementation of [*57] ten remain. n6 For example, it may be a purpose of the First Amendment to protect against governmental efforts to stifle dissent, n7 or of the Commerce Clause to prevent ""economic Balkanization' and the retaliatory acts of other states that may follow." n8 But the norms reflecting purposes such as these are too vague to serve as rules of law; their effective implementation requires the crafting of doctrine by courts. The Supreme Court has responded accordingly. By no means illegitimately, it has developed a complex, increasingly code-like sprawl of two-, three-, and four-part tests, n9 each with its limited domain.

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n6. See generally Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1213-20 (1978) [hereinafter Sager, Underenforced Norms] (discussing institutional considerations that sometimes lead courts to craft doctrines failing to enforce constitutional norms to their full conceptual limits); Lawrence Gene Sager, Foreword: State Courts and the Strategic Space Between Norms and Rules of Constitutional Law, 63 Tex. L. Rev. 959, 961-73 (1985) (discussing strategic elements in constitutional rulemaking); David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190, 190 (1988) (discussing the need

for courts to craft prophylactic rules to protect constitutional values).

n7. See Steven H. Shiffrin, The First Amendment, Democracy, and Romance 91 (1990) (arguing that a central purpose of the First Amendment is to protect dissent and dissenters); see also Johnson, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("The First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

n8. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1599 (1997) (citation omitted) (quoting Hughes v. Oklahoma, 441 U.S. 322, 325 (1979)).

n9. See Schauer, supra note 1, at 1455; see also Frederick Schauer, Codifying the First Amendment: New York v. Ferber, 1982 Sup. Ct. Rev. 285, 308-09 (noting the proliferation of doctrinal categories, each with "its own corpus of subrules, principles, categories, qualifications, and exceptions").

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Critics have protested that the Court's multipart tests are inappropriate because they do not plausibly reflect the Constitution's true meaning. n10 But this criticism misses a crucial point. Identifying the "meaning" of the Constitution is not the Court's only function. A crucial mission of the Court is to implement the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely. Or so I argue. The Court's role in implementing the Constitution through doctrine is the central focus of this Foreword.

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n10. For criticism of the Supreme Court's tendency to proliferate multiple part tests, see, for example, C. Edwin Baker, Turner Broadcasting: Content-Based Regulation of Persons and Presses, 1994 Sup. Ct. Rev. 57, 115-16; Morton J. Horwitz, The Supreme Court, 1992 Term -- Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 Harv. L. Rev. 30, 98 (1993); and Robert F. Nagel, The Formulaic Constitution, 84 Mich. L. Rev. 165, 182 (1985).

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As the Court attempts to implement the Constitution, its task is much complicated by the phenomenon of reasonable disagreement in constitutional law. n11 Many constitutional questions lack answers that [*58] can be proved correct by straightforward chains of rationally irresistible arguments. n12 As a result, reasonable citizens, lawyers, and judges differ widely about what methodology should be used to interpret the Constitution, about which substantive principles the Constitution embodies, and about how, in more practical terms, constitutional norms should be protected by doctrine. Reasonable disagreement generates at least two pervasive issues. One, which has attracted broad notice, involves the circumstances, if any, under which the

Supreme Court should invalidate action by the political branches that could reasonably be viewed as constitutionally permissible, but that the Court thinks would be found constitutionally impermissible on the best view of what the Constitution requires. n13 As a doctrinal matter, the Court frequently treats reasonable disagreement as a ground for judicial deference to the political branches of government. To cite perhaps the most prominent example, the "rational basis" test familiarly employed under the Equal Protection Clause reflects an explicitly restrained judicial response to the phenomenon of reasonable disagreement. n14 But the Court does not always defer in areas of reasonable disagreement, nor - as I argue below - should it.

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n11. See generally Cass R. Sunstein, Legal Reasoning and Political Conflict 35 (1996) (discussing various issues and challenges confronting courts in light of political disagreement); Frank I. Michelman, Brennan and Democracy, 86 Cal. L. Rev. (forthcoming May 1998) (discussing the relevance of reasonable disagreement to legal interpretation). The phenomenon of reasonable moral and political disagreement is at the heart of much of the best recent work in political theory. See, e.g., Amy Gutmann & Dennis Thompson, Democracy and Disagreement 1 (1996); John Rawls, Political Liberalism 54-58 (1993).

n12. To acknowledge reasonable disagreement is not to endorse skepticism or relativism but simply to recognize that constitutional argument, like moral discourse, Aoften fails to produce certainty, justified or unjustified, Thomas Nagel, The Last Word 101 (1997), and that questions about the validity of particular claims are often bound up with broader, equally contested substantive and methodological issues. Even if, in principle, people ought to be able to come to agreement if they participated long enough in appropriately structured, noncoercive discourse, cf. Frank I. Michelman, The Supreme Court, 1985 Term -- Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 31 (1986) (discussing work that emphasizes this possibility), experience teaches that unanimity cannot be expected at the conclusion of arguments that are bounded as a practical matter by time.

n13. Questions about the appropriate nature of judicial review in cases of reasonable disagreement date to the early, formative years of American constitutional history, when at least some jurists urged that judicial invalidation should occur only in cases of plain unconstitutionality. See Sylvia Snowiss, Judicial Review and the Law of the Constitution 13-44 (1990). In perhaps the most famous essay in the history of American constitutional law, James Bradley Thayer also treats reasonable disagreement as a central phenomenon. According to Thayer, federal courts generally did not and should not hold laws unconstitutional unless "those who have the right to make laws have not merely made a mistake, but have made a very clear one, -- so clear that it is not open to rational question." James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 144 (1893).

n14. See infra pp. 64-65, 88-89.

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The other, less noted issue raised by reasonable disagreement involves the means by which Justices of the Supreme Court, who might themselves disagree about the best reading of the Constitution, might nonetheless come to

reasonably stable agreement about doctrinal for- [*59] mulations. n15 In this Foreword, I argue that the practical need for the Court to speak effectively as an institution often requires the Justices to subordinate their personal views about how the Constitution would best be implemented and to accept doctrinal structures that they regard as less than optimal. As members of a collective body, n16 the Justices must reach complex judgments, sometimes premised on predicted effects, about when to compromise in order to achieve the law-settling benefits of a majority opinion, when to settle for a plurality opinion or to concur separately, and when to dissent. n17

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n15. Pioneering studies on this subject include Sunstein, supra note 11; Frank H. Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802 (1982); Lewis A. Kornhauser, Modeling Collegial Courts I: Path-Dependence, 12 Int'l Rev. L. & Econ. 169 (1992) [hereinafter Kornhauser, Path-Dependence]; Lewis A. Kornhauser, Modeling Collegial Courts II: Legal Doctrine, 8 J.L. Econ. & Org. 441 (1992); Lewis A. Kornhauser & Lawrence G. Sager, The One and the Many: Adjudication in Collegial Courts, 81 Cal. L. Rev. 1 (1993) [hereinafter Kornhauser & Sager, The One and the Many]; and Lewis A. Kornhauser & Lawrence G. Sager, Unpacking the Court, 96 Yale L.J. 82 (1986).

n16. See Kornhauser & Sager, The One and the Many, supra note 15, at 3-10.

n17. See id. at 7 (discussing these questions); see also Maurice Kelman, The Forked Path of Dissent, 1985 Sup. Ct. Rev. 227, 248-58 (examining the elements of and motivations for dissenting opinions).

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The institutional imperative for the Justices to engage in compromise and accommodation raises a further set of questions about the Supreme Court's obligation of constitutional fidelity. By common consensus, the Justices have a duty to be faithful to the Constitution. n18 In the literature on constitutional theory, the most commonly disputed question is how the meaning of the Constitution, to which fidelity is owed, would ideally be specified. n19 The practical and institutional [*60] pressures that require compromise to achieve workable doctrine receive scant attention. In this Foreword, I argue that the fidelity owed by the Justices must be defined partly in institutional terms, not simply by an abstract ideal of constitutional truth. Sometimes, fidelity to the project of implementing the Constitution successfully requires the Justices to compromise their personal views and ideals.

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n18. See generally Symposium, Fidelity in Constitutional Theory, 65 Fordham L. Rev. 1247 (1997).

n19. See James E. Fleming, Fidelity to Our Imperfect Constitution, 65 Fordham L. Rev. 1335, 1335 (1997) ("The central question ... "What is the best conception of fidelity in constitutional interpretation?,' ultimately poses the questions "What is the Constitution and how should it be interpreted?'").

In the literature on constitutional theory, some identify constitutional meaning with the "original understanding" of constitutional provisions. See,

e.g., Raoul Berger, Federalism: The Founders' Design 15-17 (1987); Robert H. Bork, The Tempting of America: The Political Seduction of the Law 143-46 (1990); Earl M. Maltz, Rethinking Constitutional Law: Originalism, Interventionism, and the Politics of Judicial Review 15-36 (1994). Within the Supreme Court, Justices Scalia and Thomas frequently champion this view. See, e.g., McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 358-59 (1995) (Thomas, J., concurring in the judgment) (calling for originalist interpretation of the First Amendment); Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 862 (1989) (defending an originalist over a nonoriginalist approach to interpretation); Clarence Thomas, Judging, 45 U. Kan. L. Rev. 1, 6-7 (1996) (same). Other Justices occasionally join them, though on a less regular basis. See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting) (joined by Rehnquist, C.J., and O'Connor & Scalia, JJ.); McIntyre, 514 U.S. at 371 (Scalia, J., dissenting) (joined by Rehnquist, C.J.).

Resisting the claims of a narrow "originalism," others assert that fidelity should run not to the expectations and understandings of those who wrote and ratified relevant constitutional language, but to the abstract principles, as best understood in light of correct political morality, that the Framers and ratifiers enacted or that the Constitution embodies. See, e.g., Ronald Dworkin, Freedom's Law 4-5, 11-12 (1996) [hereinafter Dworkin, Freedom's Law]. On this view, constitutional adjudication is pervasively "a matter of principle," with the Supreme Court functioning as the quintessential "forum of principle." Ronald Dworkin, A Matter of Principle, 69-71 (1985) [hereinafter Dworkin, A Matter of Principle]. In something approaching an effort to split the difference, a third school of fidelity theorists characterizes constitutional interpretation as "translation." See, e.g., Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165, 1171-73 (1993) [hereinafter Lessig, Fidelity in Translation]; Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan. L. Rev. 395, 410 (1995) [hereinafter Lessig, Understanding Changed Readings]; Jeanmarie K. Grubert, Note, The Rehnquist Court's Changed Reading of the Equal Protection Clause in the Context of Voting Rights, 65 Fordham L. Rev. 1819, 1825-29 (1997). According to this position, the central challenge for constitutional adjudication is to determine the "meaning" of principles endorsed by the Constitution's Framers and ratifiers in the divergent contexts in which contemporary issues arise. On this view, interpretation is a two-step process. The first step is to identify a historical meaning; the second is to carry that meaning forward into a new context. See Lessig, Understanding Changed Readings, supra, at 396-410.

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Part I of this Foreword develops the thesis that a gap frequently, often necessarily, exists between the meaning of constitutional norms and the tests by which those norms are implemented. Against this background, Part II distinguishes eight different kinds of tests that the Court employs to implement the Constitution in one or more doctrinal settings. These include "balancing" tests, "effects" tests, "forbidden-content" tests, and "suspect-content" tests. Part III considers the advantages and disadvantages of these different kinds of tests; it addresses questions about how the Court decides, and should decide, which tests to employ.

Part IV examines constitutional doctrine from another perspective. Whereas Parts II and III are concerned with the content of Supreme Court doctrines, Part IV addresses the role of doctrine in constitutional adjudication within the

Court itself and the processes by which the Court attempts to reach agreement concerning doctrinal formulations.

At the risk of oversimplification, Part IV argues that constitutional doctrine - once it is developed - sustains a crude, admittedly permeable distinction between two kinds of cases. In "ordinary" cases, the Court applies the framework established by prior decisions. In light of reasonable disagreement concerning many points that doctrine purports to settle, effective implementation of the Constitution requires respect for stare decisis, even in the Supreme Court. Nonetheless, direct appeals to constitutional norms are never, in principle, precluded. "Extraordinary" cases, which the Court believes cannot or should not be resolved without a fresh examination of underlying "first princi- [*61] ples," n20 are especially revealing of the Court's evolving conception of its role and of its obligation of fidelity to the Constitution. In discussing some of the extraordinary cases decided by the Court during its 1996 Term, Part IV has two recurring themes. One involves the division within the Court about the underlying principles that constitutional doctrine ought to reflect and the difficulty of achieving agreement on workable doctrines to protect shared, sometimes compromised, formulations of those principles. The other theme concerns the significance, if any, that the Court should attach to the phenomenon of reasonable disagreement among the broader public and between courts and legislatures about constitutional norms.

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n20. See, e.g., United States v. Lopez, 514 U.S. 549, 552 (1995) (asserting that in determining the scope of congressional regulatory power under the Commerce Clause "we start with first principles"); McIntyre, 514 U.S. at 358-59 (Thomas, J., concurring in the judgment); Charles Fried, The Supreme Court, 1994 Term -- Foreword: Revolutions?, 109 Harv. L. Rev. 13, 16 (1995) (observing that "the pages of the United States Reports" and academic commentaries both "ring with calls to examine, or reexamine, first principles").

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Continuing to explore these themes in light of the Court's decision in last Term's "right-to-die" cases, n21 Part V discusses how the Court's function in crafting constitutional doctrine, especially in cases that the Court experiences as extraordinary, may appropriately vary over time. Among the relevant considerations is the Court's capacity to function effectively as a representative decisionmaker - to render decisions on controverted issues that will, in time, command broad assent. For a variety of reasons, Part V concludes, the current Court would generally serve best by crafting doctrine cautiously.

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n21. See Vacco v. Quill, 117 S. Ct. 2293 (1997); Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

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I. Tests and the Constitution

The indispensable function of constitutional doctrine - including the multipart tests that critics have pilloried n22 - is to implement the Constitution.

Nonetheless, the relation between the meaning of the Constitution, on one hand, and the doctrinal tests crafted and applied by the Supreme Court, on the other, frequently is not and sometimes could not be one of identity. n23 First, there is the banal point that the [*62] Supreme Court may err; n24 it may, for example, reach a mistaken determination about whether a category of speech or expressive conduct, such as obscenity or flag burning, comes within "the Freedom of Speech" that the First Amendment guarantees. n25

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n22. See supra note 10 and accompanying text.

n23. See Board of Educ. v. Dowell, 498 U.S. 237, 245-46 (1991) (cautioning that the Court's concepts should not be treated as if they were part of the Constitution); South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (asserting that judges are obliged to enforce the Constitution, "not the gloss which [the Court] may have put on it" (quoting William O. Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949)) (internal quotation marks omitted)); Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring) ("The ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."); Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 767 (1988) ("From the beginning of our political and legal tradition, we have differentiated between text and its interpretation. The implicit premise has been to privilege the text over its interpreted gloss."); Note, Constitutional Stare Decisis, 103 Harv. L. Rev. 1344, 1347-49 (1990) (same); James C. Rehnquist, Note, The Power That Shall Be Vested in a Precedent: Stare Decisis, The Constitution, and the Supreme Court, 66 B.U. L. Rev. 345, 366 (1986) (discussing the relative importance of adhering to precedent in comparison with deciding based on the Justices' independent understanding of constitutional commands); see also Sager, Underenforced Norms, supra note 6, at 1213 (noting the phenomenon of judicial underenforcement of constitutional norms); Strauss, supra note 6, at 190 (noting the prominence of prophylactic rules in constitutional law).

The question whether the relation between judicial doctrine and the Constitution is one of identity is different from the question whether judicial doctrine, once propounded, must be accepted by other branches of government as binding. For useful discussion of the extent to which judicial pronouncements bind other branches, see, for example, Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 Iowa L. Rev. 1267, 1268 (1996); Geoffrey P. Miller, The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law, 56 Law & Contemp. Probs. 35, 38 (1993); and Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power To Say What the Law Is, 83 Geo. L.J. 217, 220 (1994).

n24. See Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result) ("We are not final because we are infallible, but we are infallible only because we are final.").

n25. On the distinction between "speech" and "the Freedom of Speech," see Schauer, cited above in note 5, at 900.

To cite another point of current contention, Justices Scalia and Thomas recurrently argue that the Court has erred in holding that the Commerce

Clause, besides empowering Congress, imposes direct restraints on state legislative authority. See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1608-14 (1997) (Scalia, J., dissenting).

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A second point bears more interestingly on the nature of the judicial role in implementing the Constitution and, in particular, on the Supreme Court's obligation of constitutional fidelity. Frequently, a perfect correspondence could not, even in principle, exist between the meaning of constitutional norms and the doctrinal tests by which those norms are implemented. As suggested above, some constitutional norms may be too vague to serve directly as effective rules of law. n26 In addition, in shaping constitutional tests, the Supreme Court must take account of empirical, predictive, and institutional considerations that may vary from time to time. n27

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n26. See supra p. 57.

n27. See Sager, Underenforced Norms, supra note 6, at 1217-20; Strauss, supra note 6, at 207-08; cf. Anderson v. Creighton, 483 U.S. 635, 643-44 (1987) ("The precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable."); T.M. Scanlon, Rights, Goals, and Fairness, in Public and Private Morality 93, 103 (Stuart Hampshire ed., 1978) (stating that claims of right are "generally backed" by a "claim about how individuals would behave or institutions would work" if the asserted right were not recognized, a value-based assertion that "this result would be unacceptable," and a "further empirical claim about how the envisaged assignment of rights" will produce a normatively preferable outcome).

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The doctrines imposing First Amendment restrictions on state libel law furnish a well-known example of the kinds of considerations to which the Court, in framing constitutional doctrine, must respond. n28 [*63] In New York Times v. Sullivan n29 and Gertz v. Robert Welch, Inc., n30 the Court held that the First Amendment forbids recovery for the defamation of public officials and other public figures unless the defendant promulgated a false, defamatory utterance "with "actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." n31 This rule undoubtedly confers immunity on some false and defamatory statements that are worthless from a constitutional perspective. n32 As the Court recognized, however, mistakes are "inevitable in free debate," n33 and a rule allowing all false and defamatory utterances to be actionable would have a predictable effect, albeit one of uncertain magnitude, in chilling critical commentary. The Court therefore set out to craft doctrine that would ensure "breathing space" for First Amendment freedoms. n34

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n28. For illuminating discussions of the doctrine-crafting challenges confronting the Court in these cases, see Melville B. Nimmer, The Right To Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to

Privacy, 56 Cal. L. Rev. 935, 957 (1968); and Strauss, cited above in note 6, at 198.

n29. 376 U.S. 254 (1964).

n30. 418 U.S. 323 (1974).

n31. Id. at 327-28 (quoting Sullivan, 376 U.S. at 279-80).

n32. See id. at 340.

n33. Id.

n34. Sullivan, 376 U.S. at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)) (internal quotation marks omitted). In Gertz's alternative formulation, the aspiration was to "protect some falsehood in order to protect speech that matters." 418 U.S. at 341.

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As thus conceived, the Court's task was not only to balance, in an abstract way, the First Amendment interest in promoting the free flow of critical comment against the states' interest in protecting reputations. The Court also had to make more concrete, empirical, and predictive assessments about the relative proclivity of the press to engage in self-censorship under alternative liability regimes; about the proportion of truthful and untruthful assertions that would be chilled by such regimes; about the harms that would be done by false speech and the benefits of truthful speech that would be forgone under various imaginable rules; and about the practical competence of the courts to administer particular liability standards fairly. n35

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n35. See, e.g., Nimmer, supra note 28, at 948-55; Strauss, supra note 6, at 200 (addressing the importance of predictive assessments to First Amendment analysis).

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Sullivan and Gertz are by no means atypical in their reliance on empirical, predictive calculations. n36 In the past Term, for example, Clinton v. Jones n37 invoked similarly predictive assessments in holding that the President enjoys no temporary immunity from civil suits based on his unofficial acts. n38 In rejecting President Clinton's claim that the Constitution required a stay of a suit against him until the end [*64] of his term, the Court concluded that disruption of essential presidential functions was unlikely to occur n39 and, in any event, that the exercise of sound discretion by the trial judge would provide an adequate safeguard against this potential consequence. n40

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n36. See generally David L. Faigman, ANormative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation, 139 U. Pa. L. Rev. 541, 547-49 (1991) (arguing that judicial assumptions about background facts play a pervasive role in constitutional law).

n37. 117 S. Ct. 1636 (1997).

n38. See id. at 1643-52.

n39. See id. at 1651.

n40. See id. at 1650-51.

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As Clinton v. Jones illustrates, the Court does not always frame constitutional doctrine to ensure that constitutional values are protected to the fullest possible extent. Just as Sullivan and Gertz "protect some falsehood in order to protect speech that matters," n41 some constitutional tests reflect an implicit judgment that it would be too costly or unworkable in practice for courts to enforce all constitutional norms to "their full conceptual limits." n42 A relatively clear example comes from another case decided last Term, Maryland v. Wilson, n43 which held that the Fourth Amendment categorically permits police officers making traffic stops to order all passengers out of stopped vehicles, apparently without regard to the officers' motivations. n44 Taken to its full conceptual limit, the Fourth Amendment would arguably bar any seizure effected in the absence of a case-specific ground for suspicion; at the very least, it would forbid any seizure lacking a legitimate purpose. But the Court, taking note of likely consequences, opted for a doctrinal formulation that it thought would be "more likely to" minimize assaults on law enforcement officers than would other plausible alternatives. n45

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n41. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

n42. Sager, Underenforced Norms, supra note 6, at 1221.

n43. 117 S. Ct. 882 (1997).

n44. See id. at 886. The Court had held in a case decided earlier in the 1996 Term, Ohio v. Robinette, 117 S. Ct. 417 (1996), that when a police officer is justified by the objective circumstances in asking a driver to exit an automobile, "subjective thoughts" are irrelevant. Id. at 421.

n45. Wilson, 117 S. Ct. at 885 n.2.

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Lawrence Sager offers a more significant example of "underenforced" constitutional norms. n46 According to Professor Sager, the Equal Protection Clause of the Fourteenth Amendment expresses the principle that "[a] state may treat persons differently only when it is fair to do so." n47 If this is the norm, then the most familiar equal protection test, under which courts uphold classifications that are rationally related to any actual or hypothesized state interest, n48 is an instance of constitutional "underenforcement." The Court has determined that allowing judges to make independent, case-by-case assessments of the fairness of statutory classifications would invite excessive [*65] litigation and generate unpredictable and conflicting results. n49 This judgment about undesirable consequences, rather than a decision about constitutional

"meaning," n50 has led the Court to develop a doctrine that prescribes broad judicial deference to legislative decisions. n51

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n46. See Sager, Underenforced Norms, supra note 6, at 1215.

n47. Id.

n48. See, e.g., FCC v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993) ("Where there are "plausible reasons' for Congress' action, "our inquiry is at an end.'" (quoting United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980))).

n49. See Sager, Underenforced Norms, supra note 6, at 1215-20.

n50. See Strauss, supra note 6, at 205-06. Strauss argues:

One of the principal justifications for rational basis review is that the legislature is best able to assess the complex factual issues underlying social and economic legislation; courts, lacking the legislature's fact-finding capacities, are ill-equipped to second-guess its judgments.... This justification presupposes that an omniscient court -- or even a court that conducted an exhaustive factual investigation in each case -- would invalidate many statutes that survive rational basis review.... The "real" equal protection clause requires invalidation of such statutes. Rational basis review deviates from the "real" equal protection clause by upholding such statutes; the justification for doing so is that detailed factual investigation would be too costly and error-prone.

Id.

n51. There are at least two bases on which someone might deny the possibility of any constitutionally legitimate gap between the meaning of the Equal Protection Clause and the rational basis test. One possible approach would maintain that constitutional tests such as the rational basis test, if they are legitimate at all, are legitimate because they reflect either the original understanding of the meaning of the constitutional provisions that they implement or the original understanding of how those provisions would be implemented. But most originalists appear not to hold this extravagant view. See, e.g., Bork, supra note 19, at 162-63 (arguing that the originalist methodology can yield only principles, which must then be applied). Another approach would be to equate doctrinal tests with constitutional meaning by insisting that the substantive norm or principle reflected in the Equal Protection Clause, for example, is one with significant, but not unlimited, "weight," and that constitutional adjudication must therefore weigh other principles, including separation of powers principles that call for judicial deference to legislative judgments. Cf. Ronald Dworkin, Taking Rights Seriously 26 (1977) (noting that when principles "intersect," the "one who must resolve the conflict has to take into account the relative weight of each"). On this view, the "rational basis" test does not literally express the meaning of the

Equal Protection Clause, but it does (if it is indeed the constitutionally correct test) precisely define the "concrete" rights that the Constitution creates when equal protection principles are arrayed against other principles also possessing constitutional weight. Cf. id. at 93 (distinguishing between "abstract" rights and the "concrete," judicially enforceable rights that emerge when the relative weight of a right in comparison with competing "political aims" is more precisely specified). The difficulty with this account is that its depiction of constitutional adjudication as a pervasive contest of rights and principles does not adequately reflect the appropriate roles of the empirical, the contingent, the predictive, and the tactical. It is not enough for courts to identify constitutional values and weigh those abstract values against each other. As the above discussion of the judicial function in Gertz and Sullivan attempts to illustrate, courts must also ask what are the main threats to constitutional values at any particular time, which rules would work more or less effectively to protect those values, and what would be the empirical effects of alternative rule structures.

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In emphasizing that constitutional tests frequently either overenforce or underenforce constitutional norms, I do not mean to suggest that it is always easy to draw the line between a constitutional norm and its implementing doctrine, or even that it would typically be sensible to attempt to do so. n52 Moreover, it is crucial to recognize that constitutional doctrine, once established, becomes part of the fabric of [*66] constitutional law. For the Constitution to be implemented successfully, this fabric must be reasonably stable and coherent; n53 as I argue more fully below, doctrine therefore has a claim to adherence, even by Justices who believe it to be less than optimal. Nonetheless, a distinction exists between constitutional doctrine and the Constitution itself; the Supreme Court must sometimes frame doctrinal tests that cannot be linked directly, by ordinary interpretive means, to the meaning of the norms that those tests implement. What is more, the Court must not only take into account the practical adequacy of one or another test to protect underlying values, but must also weigh the costs, in practical and constitutional terms, of adding or subtracting increments of judicial protection. More specifically, the Court must assess the competence of courts to conduct particular kinds of inquiries; n54 the costs that particular tests are likely to engender - including judicial errors of both over- and under-protection and the burdens of litigation under narrower and broader, or more and less determinate, doctrinal formulations; n55 and the political fairness of having courts resolve different kinds of questions on more or less deferential bases in the face of reasonable disagreements among the citizenry, between judges and more politically accountable actors, and, in some cases, among the Justices themselves. n56

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n52. See Strauss, supra note 6, at 207-08 (observing that it would be "pointless" to try to distinguish between "what the real, noumenal Constitution would require if governments had different tendencies or the courts had different capacities" and the doctrine crafted in light of empirically relevant considerations).

n53. See Fried, Constitutional Doctrine, supra note 1, at 1152.

n54. Compare Strauss, supra note 6, at 198-204 (defending doctrines that establish presumptions of unconstitutionality in cases in which government officials likely acted for unconstitutional purposes and in which it would tax judicial competence to conduct case-by-case inquiries into actual motives), with id. at 205-06 (suggesting that "rational basis" review of economic legislation is appropriate because courts lack the practical competence to conduct the fact-finding necessary to determine whether challenged classifications are fair).

n55. See id. at 193 & n.12.

n56. See Lawrence Gene Sager, Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law, 88 Nw. U. L. Rev. 410, 425-28 (1993).

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The Court's obligation of fidelity to the Constitution needs to be seen in this light. When judicial competence is lacking or the costs of particular forms of judicial involvement would be great, the Court does not necessarily betray its obligation of constitutional fidelity if it fails to craft judicially enforceable rules that fully protect constitutional norms. n57 The Court can share responsibility for implementing the Constitution with other institutions. Conversely, when judicial enforcement seems practically necessary, and a bright-line prophylactic rule will work most effectively at relatively low cost, not every doctrine that "over-enforces" constitutional norms reflects a constitutional betrayal.

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n57. Cf. Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1784-86 (1991) (discussing judicially crafted immunity doctrines that sometimes preclude individually effective judicial remedies for constitutional rights violations).

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[*67]

In short, the Court must craft doctrine in light of judgments about what the Constitution means, but determinations of constitutional meaning do not always, or perhaps even typically, dictate with full precision what constitutional doctrine ought to be. Though based on the Constitution, constitutional doctrine and the Court's role in crafting it deserve independent attention.

II. Varieties of Doctrinal Tests

A. A Typology

As the Supreme Court confronts the task of shaping constitutional doctrine, many kinds of tests are available to it. Without claiming comprehensiveness, this Part identifies eight relatively common kinds of tests, all employed by the Court (either alone or in combination) in some areas of constitutional law to help define constitutional limits on governmental powers. n58

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n58. For a similar but distinct typology, see Fried, Types, cited above in note 1, at 56. A somewhat different set of tests may be used to assess claims that the federal government has exceeded the scope of delegated powers. Cf. United States v. Lopez, 514 U.S. 549, 556-68 (1995) (discussing tests for identifying limits of congressional power under the Commerce Clause); South Dakota v. Dole, 483 U.S. 203, 206-08 (1987) (discussing precedents establishing limits on congressional spending power). Although I do not attempt to catalogue the kinds of tests used to determine whether the federal government has exceeded the scope of delegated powers, I occasionally use separation of powers and especially federalism cases to illustrate the tests included in my typology, because many of the tests that are used to protect individual rights are also used to define limits on delegated powers.

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My list is admittedly a bit of a hodgepodge. Besides being incomplete, it does not distinguish systematically between tests that trigger judicial scrutiny (such as a test singling out statutes that discriminate on the basis of race for distinctive analysis) and tests that define particular types, levels, or tiers of judicial review (such as "strict scrutiny," "mid-level scrutiny," or "rational basis" review). n59 Among my reasons for not sharply differentiating tests that trigger judicial scrutiny from tests that prescribe a level of review is that I believe this distinction to be less categorically tight than is sometimes thought. In addition, division of constitutional tests into two basic categories may minimize the options available to the Supreme Court in determining how to protect constitutional values.

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n59. Cf. Fried, Types, supra note 1, at 55-56 (drawing this distinction).

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1.

Forbidden-Content Tests. -

One paradigmatic kind of test identifies statutes, regulations, or policies as absolutely unconstitutional based on their content. An example is the rule, apparently emerging from last Term's decision in Printz v. United States, n60 that Congress may not compel state and local governmental officers (except judges and officials of quasi-judicial bodies) to enforce a federal regulatory [*68] program. n61 A statute violating this rule is per se unconstitutional; no assessment of the government's interest in enacting the statute is necessary. n62

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n60. 117 S. Ct. 2365 (1997).

n61. See id. at 2380.

n62. See id. at 2380-81.

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2.

Suspect-Content Tests. -

Whereas forbidden-content tests mark some kinds of laws as per se invalid, suspect-content tests identify certain kinds of laws as presumptively, but not necessarily, unconstitutional. A prominent example is the First Amendment rule that content-based regulations of speech are presumptively forbidden and can be upheld only if necessary to serve a compelling governmental interest. n63

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n63. See R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."). See generally Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 47-50 (1987) (discussing the distinction between content-based and content-neutral regulations of speech); Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615, 722-28 (1991) (same).

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3.

Balancing Tests. -

In paradigmatic balancing tests, the Court explicitly assesses competing considerations to determine whether a challenged statute or action is constitutionally permissible. The Court first identifies constitutional values threatened by governmental action; next it assesses the degree of their implication in a particular case; then the Court weighs the harm to protected values against the interests that the government has endeavored to promote. The Court may also consider alternative means by which the government might achieve its ends at less cost to constitutional values.

A concrete example is the test applied by the Supreme Court last Term in Timmons v. Twin Cities Area New Party n64 to determine the permissibility under the First and Fourteenth Amendments of Minnesota "anti-fusion" statutes that prohibit candidates from being nominated for the same elective office by more than one party. n65 Writing for the majority, Chief Justice Rehnquist concluded that the state's interest in maintaining the "integrity, fairness, and efficiency" of its ballots by preventing their use as "billboards for political advertising" n66 was "sufficiently weighty" n67 to justify the prohibition against fusion [*69] candidacies. n68 The majority also found that the state had a legitimate interest in "the stability of [its] political system[ ]," which it was entitled to support by "enacting reasonable election regulations that [tend to] favor the traditional two-party system." n69

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n64. 117 S. Ct. 1364 (1997).

n65. The Court framed its inquiry as follows:

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the "character and magnitude" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "important regulatory interests" will usually be enough to justify "reasonable, nondiscriminatory restrictions."

Id. at 1370 (citations omitted).

n66. Id. at 1373.

n67. Id. at 1372 (quoting Norman v. Reed, 502 U.S. 279, 288-89 (1992)).

n68. See id. at 1375. As a preliminary matter, the Chief Justice also concluded that, although the anti-fusion rule imposed burdens on associational freedoms, those burdens were not "severe" enough to call for strict judicial scrutiny. See id. at 1372-73.

n69. Id. at 1374. In the principal dissenting opinion, Justice Stevens disagreed with each of the three Apremises" on which the majority's reasoning rested:

The Court's conclusion ... rests on three dubious premises: (1) that the statute imposes only a minor burden on the [challenging] Party's right to choose and to support the candidate of its choice; (2) that the statute significantly serves the State's asserted interests in avoiding ballot manipulation and factionalism; and (3) that, in any event, the interest in preserving the two-party system justifies the imposition of the burden at issue in this case.

Id. at 1376 (Stevens, J., dissenting).

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4.

Nonsuspect-Content Tests. -

Nonsuspect-content tests call for judicial scrutiny pursuant to standards reflecting strong presumptions of constitutional validity. n70 A well-known example is the "rational basis" test applied under the Due Process and Equal Protection Clauses to legislation that neither classifies on a "suspect" basis nor implicates a "fundamental" right. A typical formulation appeared in FCC v. Beach Communications, Inc. n71:

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n70. Cf. FCC v. Beach Communications, Inc., 508 U.S. 307, 314 (1993) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we think a political branch has acted." (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979))).

n71. 508 U.S. 307 (1993).

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In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines [e.g., race, national origin, religion, or alienage] nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.... [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. n72

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n72. Id. at 313-15 (citations omitted); see also Vacco v. Quill, 117 S. Ct. 2293, 2297 (1997) ("If a legislative classification or distinction "neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end.'" (quoting Romer v. Evans, 116 S. Ct. 1620, 1627 (1996))).

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5. Effects Tests. - Some constitutional tests focus not on the explicit content of a statute or policy, but on its effects. Effects tests either hold statutes or policies unconstitutional or, more commonly, target them for more or less searching judicial review based on their effects on constitutional rights or values, on particular groups, or on both. Last Term's decision in M.L.B. v. S.L.J. n73 furnishes an example. M.L.B. involved a Mississippi rule conditioning the right to appeal a decree terminating parental rights on advance payment of record [*70] preparation fees. n74 After a state chancery court eliminated M.L.B.'s parental rights with respect to her two children, M.L.B. filed a timely appeal but was unable to pay the $ 2,352.36 cost of preparing and transmitting the record. n75 Relying heavily on precedents from the 1950s, 1960s, and early 1970s, n76 the majority opinion found application of Mississippi's fee requirement to M.L.B. to be unconstitutional in light of its combined effects in (i) disproportionately burdening the poor (ii) in seeking access to a judicial process (iii) to resist state efforts to burden a constitutionally protected interest (iv) that is associated with family life and "the upbringing of children" and that "has ranked as "of basic importance in our society.'" n77

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n73. 117 S. Ct. 555 (1997).

n74. See id. at 560.

n75. See id.

n76. See id. at 560-62 (citing Mayer v. Chicago, 404 U.S. 189, 193 (1971); Boddie v. Connecticut, 401 U.S. 371, 374 (1971); Rinaldi v. Yeager, 384 U.S. 305, 309-10 (1966); and Griffin v. Illinois, 351 U.S. 12, 16 (1956)).

n77. Id. at 564 (quoting Boddie, 401 U.S. at 376).

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6.

Appropriate-Deliberation Tests. -

Whereas the kinds of constitutional tests canvassed so far focus mostly on the "output" of legislative and policymaking processes, an alternative kind of test looks at "inputs" n78 - at the nature of the deliberative process from which a challenged statute or policy resulted. n79 For example, the Supreme Court has suggested that the permissibility of legislation discriminating on the basis of gender depends at least partly on whether the legislature relied on unthinking stereotypes. n80 The Court has also held that legislatures may sometimes act deliberately to create so-called major- [*71] ity-minority voting districts, but may not make race the "predominant" factor in the drawing of district lines. n81

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n78. On the distinction between "input" and "output" tests, see Michael Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 284-85 (1991), and Laurence H. Tribe, The Mystery of Motive, Private and Public: Some Notes Inspired by the Problem of Hate Speech and Animal Sacrifice, 1993 Sup. Ct. Rev. 1, 19.

n79. A frequently animating idea is that the Constitution aims to establish a "deliberative democracy" and that the courts have a role in enforcing the legislature's deliberative responsibilities. See Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 69-75 (1985) (analyzing several proposals for more searching judicial review of administrative and legislative processes); see also Guido Calabresi, The Supreme Court, 1990 Term -- Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores), 105 Harv. L. Rev. 80, 83 (1991) (identifying a type of judicial review that "gives courts the power to send back for reconsideration any governmental action that arguably violates some fundamental right whenever that action seems either the product of undue haste on the part of the decisionmakers or the product of ... 'hiding'").

n80. See, e.g., United States v. Virginia, 116 S. Ct. 2264, 2275 (1996) (noting that state justification for gender-based classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); J.E.B. v. Alabama, 511 U.S. 127, 139 n.11 (1994) ("Gender classifications that rest on impermissible stereotypes violate

the Equal Protection clause."). See generally Sandra Day O'Connor, Portia's Progress, 66 N.Y.U. L. Rev. 1546, 1551-52 (1991) (tracing the Supreme Court's increasing sensitivity to gender stereotypes).

n81. See Abrams v. Johnson, 117 S. Ct. 1925, 1936 (1997); Miller v. Johnson, 115 S. Ct. 2475, 2485 (1995); see also Lawyer v. Department of Justice, 117 S. Ct. 2186, 2195 (1997) (applying the rule that "race [may] not predominate over ... traditional districting principles").

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7.

Purpose Tests. -

Another kind of constitutional test focuses on a subset of inputs into governmental decisionmaking processes. According to purpose tests, legislation or other governmental policies are invalid if developed or applied for constitutionally illegitimate reasons. n82

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n82. For a recent survey of purpose tests in constitutional law, see Ashutosh Bhagwat, Purpose Scrutiny in Constitutional Analysis, 85 Cal. L. Rev. 297 (1997). Earlier, path-breaking studies include Paul Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Motive, 1971 Sup. Ct. Rev. 95; Theodore Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 53 N.Y.U. L. Rev. 36 (1977); and John Hart Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970).

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The category of purpose tests is almost necessarily a loose one because of the multiple senses in which the term "purpose" is used. In perhaps the simplest and most familiar usage, purpose is roughly coextensive with motive. For example, legislation is invalid under the Equal Protection Clause if enacted ""because of,' not merely "in spite of,' its adverse impacts upon an identifiable group." n83 Other usages reflect more complex connections between constitutional values and officials' motivations. For example, a statute will fail scrutiny under the Establishment Clause if its purpose is to promote religion. n84 According to a leading case, a state legislature offended this prohibition when it enacted a statute barring the teaching of evolution in the public schools. n85 This ascription would probably stand even if those enacting the restriction could accurately report that their motive was not to promote religion, but to stop the communication of ideas that they believed to be educationally unsuitable (because false), or to please their constituents, or to win re-election. As implemented by a purpose test, the First Amendment precludes action on otherwise permissible considerations (such as pleasing constituents or trying to win re-election) when those reasons, in a particular case, are too conceptually or practically interconnected with constitutionally forbidden grounds for official action.

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n83. Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979). But cf. David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935, 956-64 (1989) (criticizing this definition of discriminatory intent on the ground that it ignores problems associated with unconscious bias, and proposing a test under which discriminatory intent should be found in any case in which the government's decision would have been different if the adverse impacts "fell on whites instead of blacks, or on men instead of women").

n84. See, e.g., Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997) ("We continue to ask whether the government acted with the purpose of advancing or inhibiting religion ....").

n85. See Epperson v. Arkansas, 393 U.S. 97, 109 (1968).

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[*72]

Once it is agreed which purposes are forbidden, n86 the question is whether, but for the influence of some illegitimate consideration in motivating one or more relevant decisionmakers, the government would likely have enacted a challenged statute or taken other contested steps. n87 Answering this question may present formidable evidentiary problems. n88 In at least some cases, questions about how a legislature would have acted under counterfactual conditions may pose conceptual puzzles as well. n89 In addition, the requisite inquiries may be embarrassing for a court to make, because they involve questions about the constitutional good faith of governmental officials. n90 Apparently for reasons such as these, some commentators n91 and Justices n92 have protested that courts should eschew inquiries into subjective purposes. Nonetheless, inquiries into purpose are familiar in constitutional law, n93 [*73] as they are in the moral assessment of human conduct. In many if not most cases, the relevant questions seem entirely straightforward. n94

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n86. For a discussion of some complexities involved in determining which reasons for action are constitutionally forbidden under which circumstances, see Jesse H. Choper, Religion and Race Under the Constitution: Some Similarities and Differences, 79 Cornell L. Rev. 491, 493-500, 502-08 (1994).

n87. Cf. Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 431, 439 (1996) ("The critical inquiry is whether the government would have imposed the restriction in the absence of impermissible factors ....").

n88. See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("It is virtually impossible to determine the singular "motive' of a collective legislative body ...."); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("While it is possible to discern the objective "purpose' of a statute ... , discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task."); United States v. O'Brien, 391 U.S. 367, 383-84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter."). Indeed, as I argue below, these problems may partly explain why the doctrine frequently employs what I characterize as Asurrogates" for inquiries into governmental purposes, by putting a heavy burden of justification on

kinds of statutes that are generally likely to reflect forbidden motives.

n89. Cf. Strauss, supra note 83, at 971-75 (arguing that the application of purpose tests sometimes depends on counterfactual inquiries that approach Aincoherence").

n90. See, e.g., Kenneth Karst, The Costs of Motive-Centered Inquiry, 15 San Diego L. Rev. 1163, 1164-65 (1978); Donald Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1285 (1986) ("The Justices no doubt feel some disinclination to accuse state officials of improper purpose ....").

n91. See, e.g., Alexander M. Bickel, The Least Dangerous Branch 213-21 (2d ed. 1986) (opposing inquiries into subjective motives of legislators); Carl H. Esbeck, The Lemon Test: Should It Be Retained, Reformulated or Rejected?, 4 Notre Dame J.L. Ethics & Pub. Pol'y 513, 516 (1990) (citing problems with inquiries into legislative motives to identify Establishment Clause violations).

n92. See, e.g., Church of the Lukumi Babalu Aye, 508 U.S. at 558 (Scalia, J., concurring) (refusing to join part of the Court's opinion because it departed from a "general focus on the object of the laws at issue to consider the subjective motivation of the lawmakers"); Edwards, 482 U.S. at 636-40 (Scalia, J., dissenting) (calling for abandonment of the "purpose prong" of the Lemon test for Establishment Clause violations); O'Brien, 391 U.S. at 383 ("This Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

n93. See Bhagwat, supra note 82, at 323 ("The process of attributing purposes to the actions of lawmaking bodies is implicit in the legal method.").

n94. See id. (observing that accepted methods for identifying legislative purpose yield "a reasonably consistent account in most cases"). Whatever other difficulties may be raised by inquiries into whether governmental officials acted for forbidden purposes, such inquiries do not pose the same distinctively conceptual problems as the inquiries into legislative "intent" sometimes undertaken for purposes of statutory or constitutional interpretation. See, e.g., Dworkin, A Matter of Principle, supra note 19, at 38-57 (discussing problems in identifying and cumulating relevant mental states of a multimember body); Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 29-37 (1997) (discussing problems in the use of legislative history to discern legislative intent). There is, for example, no need to discern what individual legislators thought that the legislation meant, or how they thought it would be applied to various fact situations.

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8.

Aim Tests. -

Aim tests hold statutes or policies invalid, or identify them as subject to more or less searching judicial scrutiny, on the ground that they are directed primarily at, even though they do not refer directly to (in the sense reflected in suspect-content tests), conduct that implicates constitutionally protected interests. The principal champion of aim tests is Justice Scalia. In his

concurring opinion in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, n95 for example, Justice Scalia joined a majority of the Court in invalidating a municipal ordinance that forbade a number of specific practices, involving the ritual slaughter of animals, that were predominantly engaged in by a minority religion. n96 Unlike the majority, Justice Scalia did not think that judicial inquiry should focus on the subjective purposes of lawmakers. n97 Nor did he think that the law should be subjected to heightened review based simply on its effect on minority religions. n98 In Justice Scalia's view, the vice of the challenged ordinance lay precisely in the fact that despite its even-handed form, and regardless of the subjective purposes of those who enacted it, it was targeted, as an objective matter, principally at religiously motivated practices. n99

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n95. 508 U.S. 520 (1993).

n96. See id. at 558 (Scalia, J., concurring).

n97. See id.

n98. Justice Scalia has argued consistently that government does not violate, or even implicate, the Free Exercise Clause when it passes statutes of general applicability that have the incidental effect of burdening religious practice. See, e.g., Employment Div. v. Smith, 494 U.S. 872, 885 (1990) ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct ... cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)) (internal quotation marks omitted)).

n99. See Church of the Lukumi Babalu Aye, 508 U.S. at 558 (Scalia, J., concurring). The notion of a statute's having an objective aim, that is different from both the subjective purposes of those who enacted it and at least partially distinct from its effects, is not wholly free from mystery. It seems to involve a "personification" of the law, cf. Ronald Dworkin, Law's Empire 167-75 (1986) (discussing Apersonification" as a step in interpretation), and an imputation to the law as thus personified of an aim, based on the law's preponderant effect. Although Justice Scalia apparently believes that identification of statutory aims or "objects" avoids the hazards associated with inquiries into lawmakers' "subjective" motivations or purposes, see Church of the Lukumi Babalu Aye, 508 U.S. at 558 (Scalia, J., concurring), it might be questioned whether aim tests differ from purpose tests in much besides the kinds of evidence by which they permit purpose to be proved. Whereas purpose tests admit many kinds of evidence bearing on decisionmakers' states of mind, aim tests, as employed by Justice Scalia, focus entirely on statutory language and on the language's preponderant impact on conduct that is religiously motivated or otherwise constitutionally protected. See id. at 557-58 (rejecting any inquiry into legislative motives, but endorsing a test invalidating "laws which, though neutral in their terms, through their design ... target the practices of a particular religion for discriminatory treatment"); cf. Rogers v. Lodge, 458 U.S. 613, 630-31 (1982) (Powell, J., dissenting) (arguing that in light of the costs of considering broader evidence of legislative motivation in voting discrimination cases, the Court should generally avoid inquiries into "the subjective thought processes of local officials" and require proof of

discriminatory intent by Aobjective" factors).

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B. Combinations and Permutations

The eight kinds of constitutional tests that I have distinguished are not always, or perhaps even typically, stark alternatives to each other. On the contrary, many constitutional doctrines consist of a mix of the kinds of tests that I have separately identified. n100 Consider, for example, the First Amendment test prescribed by United States v. O'Brien, n101 under which a content-neutral restriction on expressive conduct may be upheld only "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." n102 Scrutiny under the O'Brien formula is triggered by an effects test; a statute's effect in burdening conduct undertaken for expressive purposes launches judicial scrutiny under the First Amendment. The O'Brien test presupposes a negative result to a suspect-content test: the challenged statute must not discriminate against speech on the basis of content, or strict scrutiny would apply. O'Brien also calls for what might roughly be called a "balancing" assessment n103 of whether the challenged statute advances an "important" governmental interest and whether "the incidental restriction" on First Amendment freedoms is no greater than necessary. n104 In addition, the query whether the government might have achieved its end with less of an adverse impact on protected interests may serve as a surrogate for inquiry into governmental purposes. If the government might have achieved its goal without trenching on constitutional values, but chose [*75] to trench on those values anyway, there is often reason to suspect that the decision to do so was purposeful, not innocent. n105

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n100. See Fried, Types, supra note 1, at 68-71.

n101. 391 U.S. 367 (1968).

n102. Id. at 377.

n103. Here and elsewhere, I use the "balancing" rubric to encompass "mid-level" tests calling for courts to determine whether statutes advance "important" or "substantial" government interests and whether their classificatory schemes are Asubstantially" related to the promotion of those interests. See Kathleen M. Sullivan, Post-Liberal Judging: The Roles of Categorization and Balancing, 63 U. Colo. L. Rev. 293, 297 (1992) (characterizing intermediate scrutiny as an "overtly balancing mode"); see also Bhagwat, supra note 82, at 305 (classifying O'Brien's intermediate scrutiny as a balancing test).

n104. O'Brien, 391 U.S. at 377.

n105. See Fried, Types, supra note 1, at 63.

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The tests that I have distinguished can function as complements to each other even when they are not explicitly conjoined: a governmental action may be held invalid if it fails any of a number of tests. For example, a statute forbidding "potentially pregnant persons" to engage in certain hazardous activities would trigger inquiry under a suspect-content test: is the statute facially discriminatory against women? n106 Even if that question were answered in the negative, the statute would invite scrutiny under a purpose test: was the legislation passed for the forbidden purpose of harming women? n107 An appropriate-deliberation test might also apply: did the legislature act on the basis of stereotyped assumptions about women? n108

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n106. Compare Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974) (holding that an insurance scheme's exclusion of coverage for disabilities associated with pregnancy did not discriminate on the basis of gender, but instead drew a nonsuspect distinction between "pregnant women and non-pregnant persons"), with Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 644, 651 (1974) (invalidating mandatory leave policies for pregnant teachers because the policies rested on an "irrebuttable presumption" of the teachers' unfitness and thus violated the Due Process Clause).

n107. See Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (ruling that a statute should be invalidated if enacted ""because of,' not merely "in spite of,' its adverse impact upon an identifiable group").

n108. See sources cited supra note 80 and accompanying text.

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Alternatively, a statute or policy may be upheld unless it fails more than one test. For example, political gerrymanders will apparently survive judicial scrutiny unless they have both the purpose and the effect of systematically degrading the votes of one political party. n109

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n109. See Davis v. Bandemer, 478 U.S. 109, 138-39 (1986).

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Despite the possibility of combinations and permutations, distinguishing among eight relatively pure kinds of constitutional tests remains useful. Among other things, the different tests protect constitutional values in quite different ways. Viewing them as distinguishable invites questions about which tests should be preferred under which circumstances, about the different tests' relative advantages and disadvantages, and about whether some kinds of tests should be abandoned altogether. Examination of the Supreme Court's tendency to prefer particular kinds of tests may also provide a valuable measure of how the Court conceives its functions and capacities at any particular time.

III. The Relative Prominence of Different Kinds of Tests

The eight kinds of constitutional tests that I have distinguished have larger and smaller areas of formal applicability and, what is at least sometimes different, they have larger and smaller domains of practically controlling significance. To attempt to chart the precise, [*76] comparative significance of the different tests would be a heroic agenda, and I make no pretense of doing so. I do, however, wish to establish four general points about the role of different kinds of tests in constitutional law. First, although some commentators characterize the current era of constitutional law as an "age of balancing," n110 balancing tests have relatively less influence within constitutional doctrine than is often thought. Second, forbidden-content, effects, appropriate deliberation, and aim tests play relatively small roles in contemporary doctrine. Third, suspect- and nonsuspect-content tests dominate large, important areas of constitutional law. Fourth, contemporary constitutional doctrine reflects a larger concern with the legitimacy of governmental purposes than is often appreciated. Many doctrines prescribe invalidation of actions taken for forbidden reasons; other tests function as surrogates for direct inquiries into governmental purposes.

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n110. T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 972 (1987).

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The best explanation for the relative prominence of the different kinds of tests relies heavily on the phenomenon of reasonable disagreement. All things being equal, the current Court disfavors balancing tests on the ground that, given reasonable disagreement, they are insufficiently law-like. n111 Worries about reasonable disagreement similarly underlie the Court's disfavoring of effects and appropriate-deliberation tests. n112 Both tend to promote judicial review that the Court regards as too subjective and intrusive in areas marked by reasonable disagreement both among judges and between courts and legislatures. By contrast, the prominence of suspect- and nonsuspect-content tests is at least partly explained by their relative determinacy; the classification of legislation as either "suspect" or "nonsuspect" is nearly always outcome-dispositive. n113 But another impetus associated with reasonable disagreement is also at work. In the face of reasonable disagreement among the citizenry and between courts and legislatures, the two-tiered framework produced by the conjunction of suspect- and nonsuspect-content tests manifests a judicial aspiration to trust institutions of political democracy except in circumstances in which the democratic process is manifestly untrustworthy. Problems of reasonable disagreement also help explain the increasingly prominent role of purpose tests in modern constitutional doctrine: even when the Justices can agree on little else, they may be able to agree that certain governmental purposes are impermissible and that political insti- [*77] tutions lose all claim to judicial deference when they act for forbidden reasons.

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n111. See, e.g., Printz v. United States, 117 S. Ct. 2365, 2383 (1997) (arguing that balancing tests are inappropriate devices to enforce federalism and separation of powers principles); Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028, 2047 (1997) (O'Connor, J., concurring in part and concurring in the judgment) (criticizing the "principal opinion," which was joined in relevant part by only two Justices, for employing a "vague balancing test").

n112. See infra pp. 84-87.

n113. See Sullivan, supra note 103, at 296.

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A. Balancing Tests in Constitutional Law

In recent years, critics have lamented what they perceive as the dominant, even pervasive role of balancing tests in constitutional law. n114 This descriptive claim is only partly correct. To assess the significance of balancing in constitutional law, it is necessary to distinguish two types of balancing. n115 One is an aspect of the process by which the Court crafts doctrine in the first instance. The other kind of balancing is itself a doctrinal test, used to resolve individual cases.

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n114. See, e.g., Aleinikoff, supra note 110, at 943-44 (analyzing the "serious problems in the mechanics of balancing," which as "a form of constitutional reasoning ... has become widespread, if not dominant, over the last four decades"); Paul W. Kahn, The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell, 97 Yale L.J. 1, 4 (1987) (arguing that balancing "is an unacceptable foundation for the constitutional function of judicial review"); Robin West, The Supreme Court, 1989 Term -- Foreword: Taking Freedom Seriously, 104 Harv. L. Rev. 43, 47-48 (1990) ("Like the Warren and Burger Courts, when faced with a constitutional challenge to state action, the Rehnquist Court has balanced the asserted right and the severity of its infringement against the seriousness or importance of the state interest." (footnote omitted)).

n115. Cf. Nimmer, supra note 28, at 942-43 (distinguishing between "definitional" balancing, which aims at determining "which forms of speech are to be regarded as "speech' within the meaning of the first amendment," and "ad hoc" balancing "for the purpose of determining which litigant deserves to prevail in a particular case").

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1.

Balancing in the Shaping of Doctrinal Tests. -

Supreme Court judgments about which kind of test to apply frequently depend on the sort of multipart assessment that the metaphor of "balancing" reflects. Such an assessment becomes necessary whenever, after the identification of a constitutional norm or value, a further question remains about how that norm or value is best implemented in light of contingent empirical conditions,

institutional competencies and pathologies, and predictive judgments about the effects of alternative tests.

Maryland v. Wilson, n116 discussed above, illustrates the point. In Wilson, which involved the circumstances in which police can require passengers to exit a vehicle during a routine traffic stop, all agreed that the relevant constitutional principle forbade unreasonable searches and seizures. n117 The question was whether to implement this principle with a per se rule or a balancing test. To resolve this question, the Court needed to make a number of assumptions about likely consequences and, having done so, to reach a multifactored assessment concerning the kind of test that was most appropriate. In Wilson, the Court selected a bright-line rule permitting requests for passengers to get out of a vehicle; n118 in many other contexts under the Fourth Amendment, the Court has opted for case-by-case, totality-of-the- [*78] circumstances assessments. n119 But the Fourth Amendment does not make the choice between these two approaches, nor does the process of constitutional interpretation furnish any algorithm to determine the conclusion. No member of the Court, not even the Justices most drawn to "originalism," n120 suggested otherwise. "Balancing" competing considerations, the Court determined - and there is no irony in this - that the reasonableness of ordering passengers to exit stopped vehicles should be determined pursuant to a per se rule, not a case-by-case balancing process. n121

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n116. 117 S. Ct. 882 (1997).

n117. See id. at 884-85; id. at 886-87 (Stevens, J., dissenting).

n118. See Wilson, 117 S. Ct. at 886.

n119. See, e.g., Ohio v. Robinette, 117 S. Ct. 417, 421 (1996).

n120. See supra note 19.

n121. See Wilson, 117 S. Ct. at 886.

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The kind of multifactor inquiry represented by balancing also comes into play when the Court determines that a suspect-content test is preferable to a forbidden-content test; n122 that equal protection values should be protected by different kinds of tests in different doctrinal settings; and that inquiries into a decisionmaker's purposes or the quality of legislative deliberation are too costly and disruptive a means of protecting constitutional values in some contexts, but not in others. n123

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n122. See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116, 124 (1991) (applying a suspect-content rule over Justice Kennedy's protest that the Court should hold all content-based classifications per se invalid under the First Amendment).

n123. See infra note 260.

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2.

Balancing Within Constitutional Doctrine as Shaped by the Supreme Court. -

Balancing, in the sense in which I have more generally used the term, also has a formal role in a significant number of doctrinal tests. Some tests, such as the one applied in Timmons v. Twin Cities Area New Party, n124 explicitly frame the judicial inquiry as requiring balancing. n125 To cite just one more example, the test of Mathews v. Eldridge, n126 which determines the requirements of procedural due process in diverse settings, n127 is a balancing test of especially broad import. I have also treated tests calling for mid-level scrutiny, in which a court asks whether a statute is substantially related to an important state interest, as balancing tests. n128 In addition, virtually any constitutional test with a closeness-of-fit requirement n129 invites a court [*79] to determine whether, all things considered, a statute should be struck down on the ground that there are other adequately effective means by which the government might achieve its end.

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n124. 117 S. Ct. 1364 (1997).

n125. See, e.g., id. at 1370.

n126. 424 U.S. 319 (1976).

n127. See id. at 334-35.

n128. See supra note 103.

n129. Closeness-of-fit or Atailoring requirements ask[ ] ... whether there is a different method of achieving the government's goals that places fewer restrictions" on constitutionally protected rights or interests. Williams, supra note 63, at 641. Many constitutional tests call for judicial scrutiny of whether statutes or policies are reasonably fitted to the ends that they aim to promote. See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976) (ruling that classifications that discriminate on the basis of gender are unconstitutional unless they are "substantially related to achievement of [important governmental] objectives"); United States v. O'Brien, 391 U.S. 367, 377 (1968) (stating that "incidental restrictions" on First Amendment freedoms fail judicial scrutiny unless the burden they impose "is no greater than is essential to the furtherance of" an important governmental interest); Fried, Types, supra note 1, at 55 (noting the frequency with which constitutional doctrines call for inquiry into whether "the connection between [governmental] goals and the means of their åttainment" is sufficiently "tight -- "narrowly tailored' is a term frequently used").

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Any claim for the pervasive influence of judicial balancing could not, however, rest solely on tests such as these. That claim depends on a broader characterization of balancing - one that encompasses suspect-content and

nonsuspect-content tests. n130 There is, undoubtedly, a sense in which these tests could count as balancing tests. Both require courts to assess whether a statute ought to be upheld, in light of the governmental interests that it serves, despite its impact on constitutionally protected values. Nonetheless, more illumination is lost than gained by failing to distinguish relatively even-handed balancing tests, on one hand, from suspect- and nonsuspect-content tests, on the other. Even if something approaching the form of balancing is observed, it is commonplace that suspect-content tests that are ""strict' in theory" will routinely prove "fatal in fact." n131 Conversely, judicial scrutiny under rational basis review is typically so deferential as to amount to a virtual rubber stamp. n132

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n130. The Supreme Court has sometimes characterized suspect-content tests as balancing tests. See, e.g., City of Boerne v. Flores, 117 S. Ct. 2157, 2160-61 (1997) (characterizing the compelling government interest test once applied to statutes that substantially burden religious practices as a balancing test); see also Aleinikoff, supra note 110, at 946 (asserting that compelling state interest tests "exemplify" a "form" of balancing).

n131. Gerald Gunther, The Supreme Court, 1971 Term -- Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). But see Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (protesting that strict scrutiny of federal affirmative action should not necessarily be fatal in fact).

n132. See, e.g., FCC v. Beach Communications, Inc., 508 U.S. 307, 314-15 (1993) (characterizing rational basis review as "a paradigm of judicial restraint," under which "a classification ... bears a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it'" (citation omitted) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) (quoting Madden v. Kentucky, 309 U.S. 83, 88 (1940)))); see also Vacco v. Quill, 117 S. Ct. 2293, 2297 (1997) (noting that statutes subject to a rational basis test are "entitled to a "strong presumption of validity'" (quoting Heller v. Doe, 509 U.S. 312, 319 (1993))).

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3.

Criticism and Practice. -

The limited number of doctrinal tests that the Court has construed to call for serious, nondeferential balancing reflects anxieties about the balancing enterprise. A prominent criticism challenges the coherence of balancing methodologies, which prescribe that constitutional outcomes should be determined by a weighing of competing interests. n133 According to this critique, the fac- [*80] tors that are supposed to be "weighed" against each other are frequently incommensurable; n134 it makes no more sense to ask whether a right is outweighed by a governmental interest than to inquire whether a rock is heavier than a line is long. n135

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n133. See Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (noting that "the scale analogy is not really appropriate, since the interests on both sides are incommensurate"); Aleinikoff, supra note 110, at 972-96 (discussing the lack of an objective, external "scale of values" upon which to weigh the competing interests); Laurent Frantz, Is the First Amendment Law? -- A Reply to Professor Mendelson, 51 Cal. L. Rev. 729, 748 (1963) (asserting that balancing calls for judges to "measure the unmeasurable ... [and] compare the incomparable").

n134. For lucid introductions to leading positions in philosophical and legal debates about commensurability, see Frederick Schauer, Commensurability and Its Constitutional Consequences, 45 Hastings L.J. 785, 786-803 (1994), and Cass R. Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779, 795-812 (1994).

n135. See Bendix Autolite, 486 U.S. at 897 (Scalia, J., concurring in the judgment).

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This strong criticism is quite mistaken if "balancing" is conceived, as it should be, as a metaphor for (rather than a literal description of) decision processes that call for consideration of the relative significance of a diverse array of potentially relevant factors. n136 Understood in this way, the term "balancing" does not signify that decisionmaking necessarily proceeds by reducing all relevant considerations to a single metric, assigning them quantitative values, and then weighing them against one another with the precision of a scale. n137 If this misleading picture is rejected and "balancing" is viewed as a metaphor for multifactor decisionmaking, the "incommensurability" objection becomes either too strong or too weak. n138 It is too strong to be credited at all - because too inconsistent with the deepest assumptions of practical reasoning - if it suggests that, when different kinds of considerations bear on a decision, there can be "no basis in our knowledge of value" to say that one decision is rationally preferable to another. n139 In contrast, if the claim allows that rational "comparability" is possible (even if "commensurability," in the sense of measurement according to a single metric, is not), then it is too weak to show that balancing in the metaphorical sense should be abandoned as an approach to legal or other practical decisionmaking. Indeed, as I have argued above, it is hard to imagine how a multifactor decision process (which "balancing" is intended to signify) possibly could be replaced in the deliberations through which the Supreme Court frames doctrinal tests to implement recognized constitutional values.

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n136. See Richard H. Fallon, Jr., Individual Rights and the Powers of Government, 27 Ga. L. Rev. 343, 346 n.13 (1993); Steven Shiffrin, The First Amendment and Economic Regulation: "way from a General Theory of the First Amendment, 78 Nw. U. L. Rev. 1212, 1249 (1983).

n137. See Shiffrin, supra note 7, at 133-34.

n138. Cf. Jeremy Waldron, Fake Incommensurability: A Response to Professor Schauer, 45 Hastings L.J. 813, 815-17 (1994) (distinguishing "strong" and "weak" incommensurability).

n139. Id. at 816; cf. Nagel, supra note 12, at 101-25 (arguing that skeptical and relativist ethical claims must be rejected if incompatible with other claims, including first-order ethical claims, that are better supported by reason and experience).

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It is a separate question, however, whether multifactor balancing tests are likely to produce an excessive number of reasonable dis- [*81] agreements at the stage of application. Critics, supported by historical experience, have suggested that reasonable disagreement will frequently occur when the doctrinal tests formulated by the Supreme Court call for nondeferential balancing. n140 And reasonable disagreement is troubling in at least two ways.

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n140. See, e.g., Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1178-79 (1989) (discussing the lack of predictability that results from balancing).

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First, reasonable disagreement raises issues about fair allocations of political power: by what right does a court substitute its judgment for the reasonable view of politically accountable institutions concerning a disputable issue? I revisit questions involving the pertinence of reasonable disagreement, without purporting to answer them definitively, below. n141 For now, suffice it to say that anxiety about comparative judicial expertise rather clearly provides at least part of the explanation for the extremely deferential "rational basis" review applied to most challenges to legislation under the Due Process and Equal Protection Clauses.

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n141. See infra Part V.

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Second, the possibility of reasonable disagreement about the correct outcome of balancing tests frequently means that balancing doctrines will create uncertainty. Legislatures will be unsure of the limits of their authority; citizens will not know their rights; the burdens of litigation will increase. In light of considerations such as these, Justice Scalia has argued that the "rule of law" requires a "law of rules," not open-ended standards or balancing tests. n142 Taken in its strongest form, this claim is surely exaggerated. The common law, for example, is not a law of rules in Justice Scalia's sense, but may nonetheless satisfy the functional desiderata of the rule of law. n143 Nevertheless, concerns about notice and predictability cannot be dismissed cavalierly; measured against these concerns, doctrines that call for serious, case-by-case judicial balancing are frequently less than optimal, n144 especially when reasonable disagreement must be anticipated.

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n142. Scalia, supra note 140, at 1187.

n143. See Richard H. Fallon, Jr., AThe Rule of Law" as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 7-9 (1997) (discussing rule-of-law desiderata).

n144. See id. at 9.

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4.

Balancing Tests, Reasonable Disagreement, and the Role of the Supreme Court. -

The preferability of relatively determinate doctrinal formulations as compared with more open-ended balancing formulations - of rules versus standards - is an important and recurring issue n145 about which I have little to say that has not been said by others. I would, however, make one discrete point: anyone's view about this [*82] issue is likely to depend at least partly on her assessment of the range of reasonable disagreement about how a standard or balancing test is appropriately applied. The broader the range of reasonable disagreement, the less determinacy and predictability will be achieved, and the stronger the argument becomes (other things equal) for a more rule-like test. n146 But rules, which aspire to determine multiple outcomes in advance, are typically harder to formulate than standards or balancing tests. n147 Moreover, because more determinate doctrines attempt to resolve more questions in advance than do less determinate doctrines, it may sometimes prove more difficult for a multimember Court to come to agreement about the appropriate rule - which is to say, about the appropriate resolution of a number of future cases - than about how the balance of considerations tips in a particular case. n148

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n145. See, e.g., Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 559-68 (1992); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1687-1713 (1976); Kathleen M. Sullivan, The Supreme Court, 1991 Term -- Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 56-69 (1992).

n146. One important consideration is that rules, which determine more outcomes in advance, tend to increase the authority of the rule-maker -- a role played at least in part by the Supreme Court -- relative to the officials, including lower court judges, who are charged with making case-by-case decisions. See Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 158-62 (1991). Because rules are almost always either underinclusive or overinclusive as measured by their background justifications, an ideal decisionmaker would be able to make better decisions by referring directly to those background justifications than by deciding according to rule. See id. at 100-02. No decisionmaker is ideal, however, and a preference for more determinate tests over balancing tests at least partly reflects the view that lower courts and other law-applying officials will be prone to make more errors if given the

relative decisional freedom afforded by balancing tests than if charged with applying more determinate rules laid down by the Supreme Court. Cf. id. at 158-62 (characterizing rules as devices for the allocation of power).

n147. See generally Kaplow, supra note 145, at 621-22 (discussing considerations bearing on whether a rule or standard is preferable).

n148. See Sunstein, supra note 11, at 38-41.

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The upshot is this: even if the Court believed in principle that more determinate constitutional tests are, all things equal, preferable to balancing tests, it might find that no majority of the Justices could reach agreement on any particular relatively determinate test that a majority thought adequately protective of constitutional values. n149 For example, among those Justices united in their view of the correct result in the case before them, some might favor a suspect-content rule, while others might believe that such a rule would unacceptably overenforce constitutional values in a range of other cases. By contrast, the Court might find that it could reach agreement on the appropriate outcome on the facts, and that it could further agree that this outcome would be correct under a balancing test. If so, even if most or indeed all of the [*83] Justices began with a presumption in favor of rules, they might find themselves settling for balancing tests as a matter of second-best. n150

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n149. A majority of the Justices might be able to agree to the use of a relatively determinate test, such as a purpose test, without believing that the agreed test -- without supplementation by any other test -- protects constitutional values fully adequately. Cf. infra notes 262-269 and accompanying text (discussing the "overlapping consensus" that frequently supports purpose tests). In such a case, the Justices who agreed in principle on the need for further protection might nonetheless be unable to agree on the kind of relatively determinate test that ought to be employed as a supplement.

n150. For further discussion of the situations in which the Court might agree to balancing tests as a matter of second-best, see note 275 below.

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Within recent judicial history, the Burger Court's reputation as a "balancing" court n151 may have arisen largely from its Justices' general willingness to accept balancing tests on this basis. Both divided and "rootlessly activist," n152 the Burger Court was often willing to unite on results, and on loose methodologies, when broader and deeper agreement was impossible. More recently, Justice Scalia, in particular, has crusaded for renunciation of this relatively ad hoc approach, n153 but with less success than once seemed within his grasp. Although the Rehnquist Court generally prefers rules to balancing, n154 it has not abandoned balancing doctrines altogether. n155

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n151. See Aleinikoff, supra note 110, at 964-65 (noting that balancing "has come of age" in recent decades and that, as of the mid-1980s, "every sitting Justice of the Supreme Court had relied on balancing").

n152. See Vincent Blasi, The Rootless Activism of the Burger Court, in The Burger Court 198, 210-17 (Vincent Blasi ed., 1983).

n153. See Morrison v. Olson, 487 U.S. 654, 711-12 (1988) (Scalia, J., dissenting); Scalia, supra note 140, at 1187; see also Sullivan, supra note 103, at 301 ("Justice Scalia has made the eradication of balancing a prominent part of his intellectual agenda on the Court.").

n154. See cases cited supra note 111 and accompanying text. See generally Sullivan, supra note 145, at 69-123 (discussing the Justices' relative preferences for rules and standards).

n155. See, e.g., Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1370 (1997) ("When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the "character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden ...." (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)))).

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B. Less Influential Tests

1.

Forbidden-Content Tests. -

Forbidden-content tests are by no means insignificant in constitutional law, but their scope is less than might be expected in central, contested areas. Most of the doctrinally prominent tests under the First Amendment and the Equal Protection Clause, for example, are suspect-content rather than forbidden-content tests. A statute that regulates speech based on content, or that discriminates facially on the basis of race, is not per se unconstitutional (as it would be if a forbidden-content test applied), but is only presumptively so; the statute may be upheld if necessary to serve a compelling governmental interest. n156

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n156. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995); Shaw v. Reno, 509 U.S. 630, 642 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992).

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The reasons for the relatively small role played by forbidden-content tests are not hard to discern. It is virtually impossible, in practice, to generate a set of forbidden-content tests that would cover the entire universe of constitutional law (and not require supplementation by other kinds of tests); provide adequate protection for constitutional [*84] values; and manage not

to encroach too far on the practically necessary powers of government. n157 For reasons of prudence, the Court hesitates to say that government may never, no matter how great the perceived emergency, enact suspect legislation. n158

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n157. In addition to permitting responses to different kinds of emergencies, constitutional doctrine must leave the government some leeway to determine how to balance competing, constitutionally grounded values. See Fallon, supra note 136, at 362; see also David L. Shapiro, Federalism: A Dialogue 50-57 (1995) (arguing that strong national authority is needed to protect rights and interests against the states).

n158. A case decided last Term, Lynce v. Mathis, 117 S. Ct. 891 (1997), is illustrative. In holding that legislation retroactively canceling a released prisoner's good-time credits and compelling his return to jail violated the Ex Post Facto Clause, the Court emphasized that the crucial ex post facto inquiry involved what the legislation had in fact done, and it expressly rejected as constitutionally irrelevant a defense based on the purpose for which the state had initially adopted a good-time credit scheme. See id. at 896-97. Pointedly, however, the Court stopped short of saying that a state's purpose for withdrawing good-time credits could never overcome the presumptive constitutional invalidity of a statute retroactively withdrawing good-time credits. That question was not presented, and the Court presumably did not wish to foreclose its options. See id. at 898.

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2.

Effects Tests. -

Modern constitutional doctrine places relatively little reliance on effects tests - at least when the term refers to tests that trigger heightened judicial scrutiny of statutes that have an adverse impact on minority groups or on constitutionally protected interests in cases in which suspect-content rules do not apply. The central equal protection case is Washington v. Davis, n159 which held that statutes and regulations do not trigger strict judicial scrutiny merely because they impose disproportionate burdens on racial or other minorities. n160 More generally, the Court has held that statutes that reach a broad range of prohibitable conduct are subject only to deferential review even if they have the "incidental" effect of burdening constitutional rights. n161 If a statute does not specifically target protected speech or conduct, no effects test generally applies n162 - even though, [*85] from the perspective of someone claiming a constitutional right, the government's innocent purpose may matter little. n163

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n159. 426 U.S. 229 (1976).

n160. See id. at 239-41; see also City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (plurality opinion) (holding that discriminatory intent is also necessary to establish a violation of the Fifteenth Amendment guarantee of equal voting rights).

n161. See, e.g., Employment Div. v. Smith, 494 U.S. 872, 885, 890 (1990) ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct ... "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988))); Goldman v. Weinberger, 475 U.S. 503, 509-10 (1986) (upholding a generally applicable military regulation that prohibited a soldier from wearing a yarmulke while on duty). See generally Michael C. Dorf, Incidental Burdens on Fundamental Rights, 109 Harv. L. Rev. 1175, 1199-1232 (1996) (discussing the relevance of "incidental burdens" under various doctrines).

n162. See, e.g., Smith, 494 U.S. at 882 (holding that the incidental effect of a generally applicable law in burdening religious practice will not trigger strict scrutiny under the Free Exercise Clause); Arcara v. Cloud Books, Inc., 478 U.S. 697, 706-07 (1986) (holding that a closure remedy enforced against a bookstore for unlawful conduct did not trigger First Amendment scrutiny); Davis, 426 U.S. at 239-40 (holding that a statute's disproportionally adverse impact on racial minorities will not trigger heightened judicial scrutiny under the Equal Protection Clause).

n163. See Dorf, supra note 161, at 1177.

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Effects tests have not vanished entirely from the scene. To take perhaps the most prominent example, restrictions on conduct become subject to First Amendment scrutiny under the test of United States v. O'Brien n164 when they burden expressive action. In addition, the Court has still not formally overruled the much maligned test for Establishment Clause violations introduced by Lemon v. Kurtzman, n165 which holds statutes invalid if they have the primary effect of either promoting or inhibiting religion. n166 Significantly, however, the current status of the Lemon test is in doubt, n167 and there has even been some uncertainty in recent decisions involving the kind of burden on expressive activity that is necessary to trigger First Amendment scrutiny under O'Brien. n168

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n164. 391 U.S. 367 (1968). For a brief discussion of the O'Brien test, see notes 101-105 above, and accompanying text.

n165. 403 U.S. 602 (1971).

n166. See id. at 612 (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

n167. In Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995), a majority of the Court, albeit without a majority opinion, appeared to apply a different test under which the crucial question was whether the government could reasonably be perceived as having endorsed religion. See id. at 784 (Souter, J., concurring in part and concurring in the judgment); id. at 773-83 (O'Connor, J., concurring in part and concurring in the judgment); id. at 799-800 (Stevens, J., dissenting); id. at 817-18 (Ginsburg, J., dissenting) (emphasizing the failure of the government to make clear that it did not endorse a religious display in a public forum); see also Kent Greenawalt, Quo Vadis:

The Status and Prospects of "Tests" Under the Religion Clauses, 1995 Sup. Ct. Rev. 323, 370 (concluding that in Pinette "five Justices considered endorsement in some form to be critical"). But cf. Agostini v. Felton, 117 S. Ct. 1997, 2008-09 (1997) (affirming the continuing relevance under the Establishment Clause of inquiries such as those called for by the Apurpose," "effect," and "entanglement" prongs of the Lemon test).

n168. The Supreme Court's practice in cases under the Free Speech Clause presents at least a surface inconsistency: the approach in Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986), holding that the application of a generally applicable statute with a tendency to burden speech should not be subject to any First Amendment scrutiny, see id. at 704-07, appears discordant with United States v. O'Brien, 391 U.S. 367 (1968), which held that in cases involving elements of "speech" and "nonspeech," "incidental limitations on First "mendment freedoms" should be subjected to First Amendment scrutiny under a distinctive, three-part test, id. at 376-77. See David Bogen, Generally Applicable Laws and the First Amendment, 26 Sw. U. L. Rev. 201, 222-32 (1997) (describing a "conflict" among the approaches of recent First Amendment cases). The most plausible rationalization of the cases suggests that O'Brien's elevated scrutiny will typically be triggered only when the conduct that is incidentally restricted itself has an expressive element, and there is therefore a Adanger" that "a speech-suppressive administrative motive" was at work. Srikanth Srinivasan, Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court's Jurisprudence, 12 Const. Commentary 401, 415-20 (1995).

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The reason for the Court's chariness concerning effects tests seems clear: the Justices believe that for courts to invalidate every governmental act that incidentally burdens constitutional rights or disproportionately disadvantages minorities would infringe too far on powers [*86] that must, as a matter of good sense, be vested in government. n169 And for courts to engage in open-ended balancing of all acts that incidentally affect constitutionally protected interests would invite too many inquiries that are too little determined by legal rules. n170 In a world of reasonable disagreement, the Court believes, the judicial role must be cabined to protect reasonable choices by politically accountable decisionmakers against too many costly and unpredictable assessments by courts.

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n169. The Court made its concerns clear in the leading case of Washington v. Davis, 426 U.S. 229 (1976):

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 248.

n170. See, e.g., Dorf, supra note 161, at 1178 ("The doctrinal distinction between direct and incidental burdens rests partly on a floodgates concern."); Frederick Schauer, Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications, 26 Wm. & Mary L. Rev. 779, 784 (1985) ("To be concerned significantly, in a constitutional sense, with incidental effects is to be committed to judicial scrutiny of an enormous range of government decisions.").

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3.

Appropriate-Deliberation Tests. -

Apparently for similar reasons, the Court only rarely employs appropriate-deliberation tests. Despite claims of republican revivalists that the Constitution aims to create a deliberative democracy n171 in which the legislature defaults on its obligations if it fails to give careful, sympathetic consideration to all groups' interests and all reasonable points of view, the quality of governmental deliberation - or indeed its absence - is generally held irrelevant under most constitutional provisions, including the Due Process, Equal Protection, and Takings Clauses. n172

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n171. See Frank Michelman, Law's Republic, 97 Yale L.J. 1493, 1505-07 (1988); Michelman, supra note 12, at 17-19; Sunstein, supra note 79, at 30-31.

n172. See, e.g., United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress' action ... it is ... "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision ...." (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960))); Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1710-27 (1984).

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This generalization does not lack exceptions. As noted above, the government may apparently differentiate based on gender only if its deliberation is thoughtful, not corrupted by stereotypes. n173 In another set of exceptional cases, current doctrine sometimes calls for inquiry into the quality of governmental deliberations when government takes race into account for inclusionary reasons. Under Justice Powell's still controlling opinion in Regents of the University of California v. Bakke, n174 educational institutions may consider race in making indi- [*87] vidualized judgments about applicants' capacities to contribute to "diversity" in their student bodies. n175 But while race can count as a "plus," n176 it apparently must not count too heavily. The Court has taken a similar approach to the question whether legislatures can deliberately create so-called "majority-minority" voting districts, in which traditional minority groups constitute more than half of the electorate. According to the Court's recent decisions, legislators may treat

race as a relevant factor but generally not as the "predominant" consideration in drawing district lines. n177

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n173. See sources cited supra note 80 and accompanying text.

n174. 438 U.S. 265 (1978). In Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S. Ct. 2580 (1996), the court of appeals held that use of race as a factor in law school admissions for the purpose of achieving diversity was per se proscribed. See id. at 946, 948. According to the two-judge majority, "Justice Powell's view in Bakke" that race could permissibly be treated as a "plus" in the search for diversity was "not binding precedent," because it "was joined by no other Justice." Id. at 944. In fact, however, Justice Powell's reasoning was crucial to the judgment of the Court that not all use of race in the admissions process was forbidden. In addition, a majority of the Court did join in Part V-C of Justice Powell's opinion, in which the permissibility of some consideration of race in admissions processes was expressly contemplated. See Bakke, 438 U.S. at 320; id. at 272.

n175. See Bakke, 438 U.S. at 317.

n176. See id.

n177. See Abrams v. Johnson, 117 S. Ct. 1925, 1936 (1997) (noting that "if race is the predominant motive in creating districts, strict scrutiny applies, and the districting plan must be narrowly tailored to serve a compelling governmental interest" (citation omitted)); Miller v. Johnson, 115 S. Ct. 2475, 2486 (1995) (noting that the state "may not separate its citizens into different voting districts on the basis of race"); see also Lawyer v. Department of Justice, 117 S. Ct. 2186, 2195 (1997) (applying the rule that "race [may] not predominate over ... traditional districting principles"). For valuable commentary, see Pamela S. Karlan & Daryl J. Levinson, Why Voting Is Different, 84 Cal. L. Rev. 1201, 1201-04 (1996), and Richard H. Pildes, Principled Limitations on Racial and Partisan Redistricting, 106 Yale L.J. 2505, 2506 (1997).

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When the doctrinal norm is conjoined with its exceptions, the pattern seems clear. The Court generally eschews inquiry into the quality of governmental deliberations, but it makes exceptions in some cases in which governmental decisionmaking involves reliance, ostensibly for benign purposes, on considerations that the Court regards as suspect or quasi-suspect. Clearly ambivalent about whether "preferential" treatment based on race and gender should be permitted at all, the Court has crafted doctrine aimed at ensuring that these factors will be considered only in ways that the Court finds permissible. Possibly because of the social salience of race and gender, the Court thinks it crucial that norms disfavoring, if not prohibiting, race- and gender-based decisionmaking should not go significantly underenforced, and it appears willing to bear the costs of especially difficult and sensitive inquiries to minimize underenforcement. n178

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